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The important question arose in the case of *In re* fore the Circuit Court of Appeals of the Ninth Circuit, whether a payment made on account by an insolvent debtor, in the ordinary course of business, within four months prior to his adjudication in bankruptcy, where it does not appear that the creditor receiving the payment had reasonable cause to believe that it was intended as a preference, constitutes a preference, under the bankruptcy act, that will prevent the allowance of the creditor's claims for the balance of the account. Section 60 of that provides:

"(a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

It was questioned whether a payment of money in the ordinary course of business can be considered a transfer of property. In section 1 of the same act, however, the word "transfer" is defined as including "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." As the word "property" is legally understood to include every class of acquisitions which a man can own or have an interest in, it must certainly cover money; and the payment of money, therefore, by an insolvent to an unsecured creditor within the statutory period must be considered a transfer of his property, constituting a preference, under section 60a of the act of bankruptcy, the enforcement of which transfer would allow one creditor to obtain a greater percentage of his debt than any other creditors of the same class.

It was not contended that the preferred creditor believed or had any knowledge that the payment from the bankrupt was intended to give them a preference. The trustee, therefore, could not recover upon the ground stated in subdivision b of the act. But the bankruptcy act provides, in section 57g, that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." It appeared that appellees have not surrendered their preference, yet seek to have their claim allowed for the balance due them from the bankrupt, upon the contention that they received the payment from the bankrupt in good faith, without knowledge of its insolvency, continued to sell goods to the bankrupt firm in the usual course of business, and that the acceptance of said payment on account should not be held as a preference which would prevent the allowance of their claim.

The court, after a review of the act, and a consideration of its scope and purpose, held that it cannot be considered inequitable to require one who has received an undue portion of the estate, no matter if innocently, to surrender that advantage before participating in further distributions of the estate with those who have not received such preference.

It was urged very earnestly on behalf of the appellees, and by counsel who appeared as *amici curiæ*, that this interpretation of the act will be disastrous to credit; that it will unsettle business, and render mercantile transactions so uncertain and insecure that the country at large will suffer by it. It is further contended that congress did not intend by this act to interfere with or disturb the ordinary course of business of the country; and, in support of a construction of the statute that will avoid such supposed consequences, numerous authorities are cited, which may be summed up in the rule that "statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice."

"The first observation pertinent to the consideration of this rule," says United States Judge Morrow, "is that the province of construction lies wholly within the domain of ambiguity. It must therefore appear that the statute is ambiguous, and thus open to construction. The considerations of evil and hardship may properly exert an influence in giving a construction to a statute when its

language is ambiguous or uncertain and doubtful, but not when it is plain and explicit. The same may be said of the consideration of convenience, and, in fact, of any consequences. If the intention is expressed so plainly as to exclude all controversy, and is one not controlled or affected by any provision of the constitution, it is the law, and courts have no concern with the effects and consequences. Their simple duty is to execute it. That the bankrupt act is ambiguous and uncertain in many of its provisions cannot be denied, but we are of the opinion that the particular provisions under consideration are reasonably clear and certain. Section 57g provides that the claims of creditors who have received 'preferences' shall not be allowed unless such creditors shall surrender their 'preferences.' There is no ambiguity in this provision, and no uncertainty as to its purpose. When a creditor presents a *bona fide* claim against the bankrupt estate, the question to be determined is, has the creditor received a 'preference' in his dealings with the bankrupt? If he has, the claim cannot be allowed. If he has not, it must be allowed. Then the question arises, what is the meaning of the word 'preference?' If we turn to section 60a, we find the word 'preference' defined, and it is there declared to mean 'a transfer' by the bankrupt 'of any of his property,' where the effect of the enforcement of such a 'transfer' will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. This definition fits very closely into section 57g, and points out still more distinctly the preferred claims that are disallowed. But, to understand accurately the character of the transaction that will amount to a preference, we must look for the meaning of the words 'transfer of property.' This meaning is found in paragraph 25, of section 1, of the act, where a 'payment' is explicitly made one of the methods of transferring property. With respect to the question under consideration, the statute itself has furnished us with this information: (1) That a payment of money is a transfer of property; (2) a tranafer of property by an insolvent debtor, whereby his creditor obtains a greater percentage of his debt than any other creditor of his class, is a preference; (3) a claim of a creditor who has received a preference shall not be allowed, unless such creditor shall surrender his preference."

THE LAW OF SURFACE WATER AS APPLICABLE TO MISSOURI AND STATES BOUNDED BY LARGE RIVERS.

Sec. 1. Introduction.—The law of surface water deserves considerable attention in this State. It has furnished the subject of about seventy decisions in our reported cases and has been the occasion of an apparent conflict of authority in our supreme court. It is the more useful as a branch of study for the profession of Missouri because of the presence in our territory and upon our border of two of the largest rivers in the world; for, in the level and fertile bottom lands of these rivers, the question of the rights of drainage and repulsion of surface water often becomes of a practical and serious nature.

Sec. 2. Definition.—The courts have not defined surface water with exactness. The best definitions are negative in their terms and seek mainly to distinguish surface water from the waters of streams. Surface water may be said to be vagrant or wandering water lying upon or passing over the surface of land or percolating through the soil,[1] and not being within a water course. It matters not from what source such waters come,—whether from rains or melting ice and snow,[2] or from the overflow of streams or rivers,[3] or from underground springs,[4] or from a water course through the interstices of the rocks,[5]—if they have the qualities of a casual and temporary nature, and of not being part of a natural water course, they are treated as surface waters. It follows, then, that to define surface waters we must define with particularity a natural water course.

Sec. 3. Surface Waters Distinguished from

[1] Shane v. R. R., 71 Mo. 257; Pope v. Boyle, 98 Mo. 527; Doerbaum v. Fisher, 1 Mo. App. 149; Martin v. Benoist, 20 Mo. App. 262; Waterworks Co. v. Jenkins, 62 Mo. App. 74; Swett v. Cutts, 50 N. H. 439.

[2] Benson v. R. R., 78 Mo. 501.

[3] McCormick v. R. R., 57 Mo. 433; Shane v. R. R., 71 Mo. 287; Abbott v. R. R., 83 Mo. 271; Brink v. R. R., 17 Mo. App. 177; Schneider v. R. R., 27 Mo. App. 68; Kenny v. R. R., 74 Mo. App. 301.

[4] Swett v. Cutts, 50 N. H. 439.

[5] Waterworks Co. v. Jenkins, 62 Mo. App. 74.

Water Courses.—A water course is a stream of water usually flowing in a particular direction, having a well defined channel, bed and banks, and generally discharging itself into some other stream or body of water.[6] The water need not flow all the time. A water course may be dry part of the year.[7] It does not include the water flowing in the gorges or ravines of the land from higher to lower levels after rains or melting snows,[8] though in some States the courts seem inclined to treat these waters as natural streams when they have from time immemorial escaped through such channels regularly after the spring rains.[9] But a water course usually must be fed from other and more permanent sources than mere surface drainage.[10] Subterranean waters are subject to the same distinction between those following the course of a well defined channel and those wandering abroad or oozing through the soil. The former class is governed by rules analogous to those applicable to water courses; the latter class is treated as surface water.[11] A right of water way for surface drainage may be acquired by grant or prescription,[12] and thereafter this right of way will be regarded as a water course as between the parties, and its obstruction will be actionable. As soon as water enters a stream and commences to flow in its channel, it ceases to be surface water and constitutes a water course.[13] But if the stream, in a low place, spreads out into a morass and lower down again resumes its course in its banks, this bog is not surface water but is still part of the water course.[14] The natural overflow of streams and rivers is, as has been said, surface water. But water caused to overflow the banks of a stream by a wrongful obstruction of its channel is still a part of the water course.[15] The rule for the treatment of water courses may, for the purposes of this paper, be stated as follows: "Unless lawfully authorized no one can interfere to any material extent with the water of a running stream, and there may be recovery for damage caused thereby without proof of negligence."[16] Such diversion is a nuisance.[17] And where the injurious overflow is aggravated by the effects of melting snows and falling rains, it is not incumbent on either court or jury to discriminate between the damages so caused and those resulting purely from the action of the living stream.[18] Of course, a municipal corporation is bound by this rule if it enters upon the construction of culverts or drains, even though it need not have undertaken the work at all.[19]

Sec. 4. Sloughs, Ponds and Lakes.—Some interesting questions have arisen in regard to the nature of the water contained in the sloughs or bayous so common along our great rivers. These are depressions along the banks of the stream with more or less clearly defined channels. They are sometimes filled only by the overflow of the river, sometimes by surface water; while sometimes they contain running water which empties into the main stream lower down. When such depressions are filled with overflow or drainage from rain and snow, the water has usually been considered surface water.[20] But it seems that there is a little dubiety on the point. In the important case of Shane v. R. R.,[21] it is not impossible that the court really based its decision upon its belief that the slough in question should be treated as a water course.[22] In Railroad v. Schneider,[23] the controversy was over the damming up of the "thumb," a slough extending from a water course at right angles without a cur-

[6] Hoyt v. City of Hudson, 27 Wis. 661, quoted in Jones v. R. R., 18 Mo. App. 74; Gray v. Schriber, 58 Mo. App. 173.

[7] Rose v. St. Charles, 49 Mo. 510.

[8] Hoyt v. City of Hudson, 27 Wis. 661.

[9] Palmer v. Waddell, 22 Kan. 352; McClure v. City, 28 Minn. 186; Am. Law Rev. vol. xxiii, p. 376; Gould on Waters (2d Ed.), 522.

[10] Jeffers v. Jeffers, 107 N. Y. 650, cited in Gray v. Schriber, 58 Mo. App. 173.

[11] Waterworks Co. v. Jenkins, 62 Mo. App. 74.

[12] Dunham v. Joyce, 129 Mo. 5; Vaughn v. Rupple, 69 Mo. App. 583.

[13] Jones v. Hannovan, 55 Mo. 462.

[14] Munkers v. R. R., 72 Mo. 514; McComber v. Godfrey, 108 Mass. 219.

[15] Brink v. R. R., 17 Mo. App. 177.

[16] Abbott v. R. R., 83 Mo. 271. See also Rose v. St. Charles, 49 Mo. 510; Imler v. Springfield, 55 Mo. 119; Munkers v. R. R., 60 Mo. 334; Hosher v. R. R., 60 Mo. 329; Van Hoozier v. R. R., 70 Mo. 145; Mangold v. R. R., 24 Mo. App. 52.

[17] Dickson v. R. R., 71 Mo. 577.

[18] Bird v. R. R., 30 Mo. App. 365.

[19] Young v. Kansas City, 27 Mo. App. 101; Dillon, Mun. Corp. § 777.

[20] Shane v. R. R., 71 Mo. 237; Abbott v. R. R., 83 Mo. 271; Jones v. R. R., 18 Mo. App. 251; St. L. & I. M. R. R. v. Schneider, 30 Mo. App. 620.

[21] 71 Mo. 237.

[22] See Abbott v. R. R., 83 Mo. 271, and *post*, sec. 11.

[23] 30 Mo. App. 620.

rent and having no flow except in times of freshet. Though it was held to be no water course, Judge Thompson in a dissenting opinion seemed inclined to think it should be so treated. And in Kenny v. R. R.,[24] it was held that water escaping from a creek becomes surface water as soon as it leaves the creek, but loses that character when it reaches a slough; and that whether a slough which leaves a creek and then returns to it is a water course or not is a question for the jury. Lakes and ponds having defined banks and a permanent nature are treated by the rules of water courses, even if they are filled merely by surface drainage.[25] A land-owner may so ditch his own land as to collect and cause to flow into a pond in a body surface water which formerly flowed into the pond through natural channels.[26] Of course, he may not drain his ponds or stagnant waters upon his neighbor.[27] But overflow of a pond caused merely by detrition will not be relieved against.[28] The water of bogs, swamps, fens and morasses, being of a vagrant and unconfined character, is generally classed as surface water.[29]

Sec. 5. Proprietary Rights in Surface Water.—The rights of the owner of the soil over which a water course passes are merely those of the reasonable use of the water.[30] He may not materially diminish, divert or obstruct the flow. But surface water is regarded for many purposes as part of the soil itself. The owner of the land owns the surface water on it or in it, and he may drain it or retain it even if he thereby cuts off the supply from his neighbor's spring, provided he does not do so maliciously or unreasonably;[31] and it is perhaps doubtful but that he may do so even with malice.[32] But inasmuch as surface water is a thing usually more to be shunned than desired, the more important questions are relative to its repulsion or obstruction.

Sec. 6. Repulsion of Surface Water.—In regard to the repulsion of surface water and the obstruction of its flow, there is an irreconcilable conflict of authority in the decisions of the States. No less than three distinct doctrines are followed. These are known as the common law rule, the civil law rule and a modified rule. In regard to the latter, it is sufficient for our purpose to say that the courts seek to apply the rules to the circumstances of each case, allowing the obstructing proprietor the fullest control of his property consistent with the rights of others not to be injured. This rule is followed in Arkansas and South Carolina.[33]

Sec. 7. Same—Statement of the Common Law and Civil Law Rules.—Perhaps the clearest statement of the two doctrines is that found in the leading case of Hoyt v. City of Hudson,[34] cited with approval in many Missouri cases: "The doctrine of the civil law is that the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating on his land, which is higher, upon or over the land of the servient owner, as in a state of nature; and that such natural flow or passage of the water cannot be interrupted or prevented by the servient owner to the detriment or injury of the dominant or any other proprietor. The doctrine of the common law is that there exists no such natural easement or servitude in favor of the owner of the higher grounds as to mere surface water; and that the proprietor of the inferior tenement may, if he choose, lawfully hinder or obstruct the flow of such water thereon, and in doing so may turn the same back upon or off onto or over the lands of other proprietors without liability ensuing from such obstruction or diversion." In analyzing the decisions we find that those courts which follow the civil law rule base their reasoning upon the necessity of refraining from damage in the use of one's own and also upon the natural configuration of the soil. In other words, these courts yield obedience to the maxims, "*sic utere tuo ut non alienum lædas*," and "*aqua currit et debet currere.*"[35] On the other

[24] 74 Mo. App. 301.
[25] Schaefer v. Marthaler, 34 Minn. 487.
[26] Hoester v. Hemsath, 16 Mo. App. 485.
[27] Schneider v. R. R., 29 Mo. App. 68.
[28] Hoester v. Hemsath, 16 Mo. App. 485.
[29] Am. & Eng. Enc. of Law (1st Ed.), under head "Surface Waters."
[30] Am. & Eng. Enc. of Law (1st Ed.), vol. 28, p. 949.
[31] Waterworks Co. v. Jenkins, 62 Mo. App. 74.
[32] Phelps v. Nowlen, 72 N. Y. 39; Chatfield v. Wilson, 28 Vt. 53.
[33] See Am. & Eng. Enc. of Law (1st Ed.), under head "Surface Waters;" Gould on Waters (2d Ed.), p. 528; Am. Law Rev. vol. xxiii, p. 376.
[34] 27 Wis. 659.
[35] The leading cases on the civil law rule are Martin

hand, the courts which follow the common law rule, while not denying the force of these maxims, feel that their application to surface water is an infringement upon one's right to the "free and unfettered control of his own land, above, upon and beneath the surface"[36] as expressed in the maxim "*cujus est solum, ejus est usque ad coelum.*" So much for the general statement of the rules. A proper understanding of both is necessary for the reason that our courts have nominally followed both doctrines.

Sec. 8. Same—Missouri Law on the Subject.—The earliest decision in this State was in the case of Laumier v. Francis.[37] That case merely held that one who dams up water on another's lot by erecting a house upon his own could not recover for any damage occasioned thereby to his own house. Yet the court seemed to hint at a following of the civil law rule by unnecessarily defining a servitude or easement. After that followed a line of decisions[38] more or less clearly supporting the common law rule. They uphold the doctrine of Jones v. Hannovan,[39] that "each proprietor may control merely surface water so as to protect himself and drain it off from his own land. Surface water is considered a common enemy that each proprietor may and must fight for himself." The law of this State, then, was clearly settled in favor of the common law rule when the case of McCormick v. K. C., St. J. and C. B. R. R. came for the second time before our supreme court.[40] The facts were as follows: The railroad company, in constructing its road bed across an elliptical swale or depression in the earth, had caused the surface water to become dammed on the upper side of the track. The relieve itself of this it cut a sluice-way or culvert through the embankment, thus precipitating the surface water in a body upon plaintiff's land, to his damage. The case had been in the court before,[41] and had been remanded with a clear statement of the common law rule. In one paragraph, however, the court intimated that it would be actionable thus to collect the water in a body and precipitate it upon the plaintiff. When the case came up again Judge Napton, who delivered the opinion, regarding the paragraph noted as expressing the rule of the civil law, and citing the cases of Laumier v. Francis and Kaufman v. Griesemer,[42] declared that the plaintiff was entitled to recover because of the violation of his easement to receive the water as it would naturally flow. He expounded and expressly adopted the rule of the civil law. To the majority opinion Judge Hough dissented.

Subsequently the case of Shane v. R. R.[43] came up for decision. The facts were the reverse of those in the McCormick case. The railroad embankment dammed up a slough so that the overflow of the Missouri river was backed up upon plaintiff, to his damage. Judge Napton again delivered the opinion of the court. It was more elaborate than the other in its discussion and more positive in its adoption of the civil law rule. It held that the plaintiff might recover because his easement in the unobstructed flow of water had been violated. Judge Hough dissented still more vigorously than before on the grounds of precedent and of principle. By these two decisions, the civil law rule was in terms adopted as the law of Missouri. Yet within a year after the second of them we find the court[44] approving instructions to the effect that there could be no recovery for damages from the repulsion of mere surface water. Then followed a line of decisions[45] firmly re-establishing the common law rule. In Abbott v. R. R.[46] the court expressly overruled the Shane case and adopted the common law doctrine.

Sec. 9. Same—Has Missouri ever Followed the Civil Law Rule?—It is not impossible

v. Riddle, 26 Pa. St. 415, and Kaufman v. Griesemer, 26 Pa. St. 407.

[36] Gannon v. Hargadorn, 92 Mass. 106, the leading case on the common law rule.

[37] 23 Mo. 181.

[38] Clark's Admx. v. R. R., 36 Mo. 202; Jones v. Hannovan, 55 Mo. 462; Hosher v. R. R., 60 Mo. 329; Munkers v. R. R., 60 Mo. 334.

[39] 55 Mo. 462.

[40] 70 Mo. 359.

[41] 57 Mo. 433.

[42] 26 Pa. St. 407.

[43] 71 Mo. 237.

[44] In Munkers v. R. R., 72 Mo. 514.

[45] Benson v. R. R., 78 Mo. 504; Stewart v. Clinton, 79 Mo. 603; Jones v. R. R., 84 Mo. 181; Dunham v. Joyce, 129 Mo. 5; Hoester v. Hemsath, 16 Mo. App. 485; Jones v. R. R., 18 Mo. App. 251; Martin v. Benoist, 20 Mo. App. 262; Field v. R. R., 21 Mo. App. 600; Schneider v. R. R., 29 Mo. App. 68; Burke v. R. R., 29 Mo. App. 370; Bird v. R. R., 30 Mo. App. 365; Railroad v. Schneider, 30 Mo. App. 360; Collier v. R. R., 48 Mo. App. 398.

[46] 83 Mo. 271.

that the two cases which declare in favor of the rule of the civil law might be reconciled in their results with the weight of authority. In overruling the Shane case the court (in Abbott v. R. R.) points out that it is not unlikely that Judge Napton really decided the case on the grounds of the diversion of a water course. His expression (p. 251) that "though the slough was found, and rightly so, to be the natural channel through which the waters of the Missouri river passed in time of flood," might seem to indicate that he was thinking of water courses. And on page 252 his expression leans still more strongly to this view. He says: "Still as even in these States (*i. e.*, those following the common law rule) this right is carefully distinguished from similar rights where a water course exists by grant or prescription, it is not entirely certain how the courts would apply these doctrines to a case like the present." As to the McCormick case it is now well settled that collecting and discharging surface water in a body is an actionable wrong under either rule. This will be adverted to hereafter. Suffice it to say that expressly under the common law rule a recovery has since been allowed on facts exactly similar to those of the McCormick case.[47] Taking this view of the matter, the cases might as well have been decided as they were under the common law rule. There is, then, no conflict in the well considered decisions, and the statement of the court in the two cases, being mere *obiter dicta*, may be disregarded as authority. There are a few sporadic decisions, however, which, were the question not so well settled, might cause some confusion. One is the case of Freudenstein v. Heine.[48] Here a recovery was allowed for damage from surface water caused to run upon the land of another by the filling up of a city lot. The court may have been influenced by the principle of the civil law courts that owners of city lots are held to a stricter accountability for damage of this sort than are rural proprietors.[49] But the case has never been cited or followed and is probably wrong in principle. Another is in the very late case of Simpson v. Wabash R. R.[50] The court says: "Ordinarily the owner of the servient estate cannot erect a dam on his estate and thereby interrupt the natural flow of the surface waters and cause them to stand on the dominant estate." An examination of the case, however, will show that the court uses these terms in application to an easement or license and not in the sense in which they are used by the civil law courts. And in Arn v. Kansas City,[51] the federal court seems to have misconceived the law of Missouri, charging the jury that "the law regarding surface water is that no change thereof can be made to the injury of anyone."

Sec. 10. Same—Is the "Common Law Rule" a Misnomer?—It may not be uninteresting to digress a moment to consider whether or not the so-called common law rule was really enunciated under the common law. This is of especial value when we note that in many of our important decisions[52] the judges have expressly based their opinions on that section of our constitution adopting the common law of England as our law, so far as applicable. And in nearly every case adhering to the common law rule, the court uses the supposed expression of Lord Tenterden to the effect that "surface water is a common enemy." While this phrase is picturesque and not inaccurate, it can hardly be said to indicate the rulings of the English courts upon the subject of surface waters. It was made in the case of Rex v. Comrs. of Sewers of Pagham.[53] There certain obstructions had caused encroachments by the sea upon owners of the coast. Lord Tenterden said: "The sea is a common enemy to all proprietors on that part of the coast." It need scarcely be said that the law of the sea and that of surface water differ widely. The trend of the English decisions is not in favor of the common law rule. The present writer

[47] Wallace v. R. R., 47 Mo. App. 491. See also the remarks of the court in Martin v. Benoist, 20 Mo. App. 262.

[48] 9 Mo. App. 287.

[49] Gould on Waters (2d Ed.), p. 566.

[50] 145 Mo. 64.

[51] 14 Fed. Rep. 236.

[52] Notably in the dissenting opinion in the Shane and McCormick cases. In Hoester v. Hemsath, 16 Mo. App. 485, the court speaks of this rule as that of "the common law of England." Jones v. Hannovan, 55 Mo. 462; Imler v. Springfield, 55 Mo. 119; *Id.*, 70 Mo. 359; McCormick v. R. R., 57 Mo. 433; Hosher v. R. R., 60 Mo. 333; Shane v. R. R., 71 Mo. 237; Benson v. R. R., 78 Mo. 504; Abbott v. R. R., 83 Mo. 271; R. R. v. Schneider, 30 Mo. App. 620.

[53] 8 B. & C. 355.

has not space to review these decisions nor access to the reports of all the cases. The subject has, however, been exhaustively discussed in one of our law magazines.[54] The author reviews the leading cases[55] and reaches the following conclusion: "The law in England closely resembles the modified doctrine adopted in Arkansas. The important point is, however, that it at present does not in the slightest resemble the so-called common law rule adopted by Massachusetts, New York and other States. In view of the fact that there is not, and never has been, any law in England which will support the Massachusetts doctrine, it is difficult to see how it can be justified; and certainly it can have no claim to the name so commonly applied to it." But it is submitted that even if the common law rule be misnamed and not justified by authority, its justification may rest on its suitability to the conditions of our country. Our court has pointed out[56] that the adoption of the civil law rule would be of the utmost detriment to the enterprise of all municipal and railroad corporations, as well as to the increasing agricultural interests of the State.

Sec. 11. Same—Qualifications to the Rule.—The rule that one may repel the encroachments of surface water without liability for damage caused thereby is subject to several reasonable qualifications. In the first place, negligence in its repulsion is actionable. There seems to be no reported case where recovery was allowed on that ground alone, but in numerous decisions the courts have considered negligence in arriving at their conclusions. In stating the rule the courts almost invariably state this qualification,[57] and even where the act of God concurs with defendant's negligence to produce the damage he is still liable for the whole.[58] It has been said[59] that "if the plaintiff could have prevented the injury at a trifling expense and by reasonable exertion, his complaint is clearly *damnum absque injuria*, no matter who was originally at fault." But this is not the law.[60] No one is required to spend a single dollar to secure for himself the enjoyment of a legal right of which he is deprived by the wrongful act of another.[61] Again, it is not permissible for the superior proprietor to collect surface water on his land and then precipitate it in a body or in greatly increased or unnatural quantities upon his neighbor. As we have noted, it was a remark to this effect in the first decision of the McCormick case,[62] which in the second decision was regarded as supporting the civil law doctrine,[63] and when the court came to overrule that case[64] it did not regard this qualification as within the common law rule. Indeed, when this point came up for authoritative decision in Rychlicki v. St. Louis,[65] the judge who had delivered the opinion of the court in the Abbot case was unable to agree with the majority. But the qualification was upheld. It has abundant authority for its support.[66] It is difficult to see how there could be any doubt that collecting and discharging in a body is actionable under both rules. As we have observed, the Massachusetts courts adhere with the utmost strictness to, and, in fact, first enunciated the common law rule. Yet this qualification is well established in that State.[67] Under this principle it is actionable to shed upon a neighbor the rain water falling upon one's roof.[68] But it is to be noted in this connection that while one may

[54] Am. Law Rev., Vol. 23, p. 391.

[55] Chasemore v. Richards, 7 H. L. 349; Acton v. Blundell, 12 M. & W. 352; Rawstron v. Taylor, 11 Exch. 369; Broadbent v. Rowbotham, 11 Exch. 602; Smith v. Kenrick, 7 C. B. 515.

[56] Rychlicki v. St. Louis, 98 Mo. 501; dissenting opinions in Shane v. R. R. and McCormick v. R. R.

[57] Clark's Admx. v. R. R., 36 Mo. 202; Jones v. Hannovan, 55 Mo. 462; McCormick v. R. R., 57 Mo. 433, and 70 Mo. 359; Hosher v. R. R., 60 Mo. 333; Benson v. R. R., 78 Mo. 504; Abbott v. R. R., 83 Mo. 271; Jones v. R. R., 84 Mo. 151; Collier v. R. R., 48 Mo. App. 398.

[58] Pruitt v. R. R., 62 Mo. 527; Davis v. R. R., 39 Mo. 340; Haney v. R. R., 94 Mo. 334.

[59] In Stewart v. Clinton, 79 Mo. 603.

[60] Paddock v. Somes, 102 Mo. 226.

[61] Wood on Nuisances (2d Ed.), 506.

[62] 57 Mo. 359.

[63] 70 Mo. 433.

[64] Abbott v. R. R., 83 Mo. 271.

[65] 98 Mo. 497. This case came before the court again in 115 Mo. 662, and the plaintiff was not allowed to recover. But the principles laid down in the first decision were not disturbed and the change was for other reasons.

[66] Benson v. R R., 78 Mo. 504; Stewart v. Clinton, 79 Mo. 603; Paddock v. Somes, 102 Mo. 226; Payne v. R R., 112 Mo. 6; Martin v. Benoist, 20 Mo. App. 262; Schneider v. R. R., 29 Mo. App. 68; Wallace v. R. R., 47 Mo. App. 491; Carson v. Springfield, 53 Mo. App. 289; Cannon v. City, 67 Mo. App. 366.

[67] White v. Chaplin, 94 Mass. 516; Curtis v. Eastern R. R., 98 Mass. 428; Rathke v. Gardner, 134 Mass. 68.

[68] Sheedy v. Union Press Brick Works, 25 Mo. App. 527; McCormick v. R. R., 57 Mo. 433.

not collect the surface water falling upon his own land and discharge it upon his neighbor, he may, in resisting or repelling it when it comes to him from others, lawfully discharge it in a body upon an inferior proprietor.[69] This is well illustrated by the case of Burke v. R. R.[70] Here two railroads had tracks parallel and near to one another. The surface water collected upon the upper side of one track was, by a culvert, precipitated upon the inferior road bed. The owner of the latter constructed a culvert opposite that of the higher road, thus precipitating the water upon plaintiff to his damage. Held, that he could not recover from the inferior road.

Sec. 12. Summary.—It is submitted that the rule as gathered from the authorities may be stated as follows: In the absence of negligence, no right of action exists for damage caused by the repulsion of surface water; but such water may not be collected and precipitated in a body upon an inferior estate. It may be remarked here that as the questions of measure of damages and remedies differ in no material respect from the general law on the subject, no treatment of them need be attempted in this paper.

Sec. 13. Liability of Railroad Corporations.—With regard to rights and liabilities in surface water, municipal and railroad corporations stand, in a general way, upon exactly the same footing as individuals.[71] But questions of the liability of such corporations are often complicated by the rights and duties arising from the exercise of the prerogative of eminent domain. Where water damages property by reason of a railroad embankment, it has been held that, in the absence of negligence or unskillfulness in construction, the damage must be considered as the natural and necessary consequence of what the corporation had a right to do; and such damages must be taken to have been included in the compensation assessed and are *damnum absque injuria*.[72] Hence, even under the stricter liability imposed by the civil law rule, railroad corporations would often be relieved from responding in damages.

Sec. 14. Municipal Corporations.—The case of Gurno v. St. Louis[73] is the first and leading case upon the liability of municipal corporations in this State. The controversy in that case was over damage to a landowner from the flooding of his premises with surface water consequent upon a change of grade in a street. The court in refusing a recovery said: "A municipal corporation engaging in an undertaking which has no reference to its municipal duties is upon the same footing as a private corporation or individual. But where it acts within the scope of its charter and uses the sovereignty granted by the State, it is not liable at the suit of a citizen for consequential injuries, no matter whether the work be done skillfully or unskillfully, although it may sometimes be liable for wanton or malicious acts of its agents." The validity of this distinction between acts within the scope of powers expressly granted by the legislature and acts for its private betterment is undisputed. Liability for negligence in the latter class of acts has never been doubted. But some conflict has arisen over a city's liability for acts clearly within the scope of its charter. In the case of Thurston v. St. Joseph[74] a divided court allowed recovery for damage caused by flooding from a negligently constructed sewer, the court expressly overruling Gurno v. St. Louis so far as it conflicted. But Judge Wagner, delivering a separate opinion, conceived that the effect of the decision was not to overrule Gurno v. St. Louis, which, he thought, merely decided that a municipal corporation is not liable for damages consequent upon grading and paving a street. As to acts within the scope of its charter, he distinguishes between *quasi* judicial and ministerial proceedings of a municipal corporation, and says that negligence in the latter class is and always was actionable, and that the construction of sewers is such a ministerial duty. These views express what was undoubtedly the law of this State prior to the adoption of the constitution of 1875. In other words, a city's act might be either strictly for its private emolument—where it was liable as an individual would be,

[69] Schneider v. R. R., 29 Mo. App. 68.
[70] 29 Mo. App. 370.
[71] Gurno v. St. Louis, 12 Mo. 414; Clark's Admx. v. R. R., 36 Mo. 202; Broadwell v. City, 75 Mo. 213; Paddock v. Somes, 102 Mo. 226; Cannon v. City, 57 Mo. App. 366.
[72] Clark's Admx. v. R. R., 36 Mo. 202.
[73] 12 Mo. 414.
[74] 51 Mo. 510.

or strictly within the scope of its charter—where it would be liable for negligence in the performance of ministerial functions, but not for negligence in the performance of acts of a *quasi* judicial nature.[75]

Sec. 15. Same—Sewers and Grading of Streets Distinguished.—Nearly all the cases involving the liability of municipal corporations for damage caused by surface water arise from the performance of two classes of municipal functions—the construction of sewers and the grading and paving of streets. It is submitted that much of the obscurity surrounding the decisions can be avoided by keeping clearly in mind the fact that these two duties are very different in their nature. The construction of sewers in cities is a corporate and ministerial function as distinguished from a governmental one,[76] while the grading and paving of streets is a governmental function within the powers of the charter granted by the legislature.[77] Hence, there is no conflict in the decisions, the court refusing compensation for damages arising from grading the streets in Gurno v. St. Louis,[78] and allowing recovery for damages caused by negligence in the construction of the sewer in Thurston v. St. Joseph.[79]

Sec. 16. Same—Effect of the Constitution of 1875.—The necessity for observing this distinction does not now exist. The provision[80] of our present constitution, that private property may not be taken or damaged for public use without due compensation, gives to the party suffering damage from the exercise of a governmental power a right of action against the municipality; so that recovery may be had for damage to an abutting property owner consequent upon the establishing, raising or lowering the grade of a street.[81] Of course, the city's liability for negligence in the performance of ministerial functions, such as constructing sewers, remains unchanged.[82] But where sewer basins are stopped up,[83] or gutters are obstructed,[84] the ordinary rules of surface water have no application, since the property owner has a right to rely on these public drains, built at the expense of the property owners, for the purpose, among others, of carrying off such water.

Sec. 17. Statutory Provisions.—Several statutes have defined or qualified the common law on this subject. One of them[85] requires railroad companies to construct ditches or drains along the sides of their embankments to carry off the surface water to other ditches or to water courses, and gives a right of action to those damaged by a failure to comply with this provision. This statute has been construed as applying only to cases where the drainage has been obstructed by the railroad.[86] It does not require the company to cut openings under its embankment for the passage of the water,[87] nor to construct or maintain other than side ditches along its road bed, and if there are no natural drains or water courses with which such side drains may connect, the railroad company is excused from liability for not constructing them.[88] A swale or depression in lands leading towards a river, but having no defined channel or receptacle for the drainage water, was held not to constitute a natural drain within the meaning of the statute.[89] The statute does not require the companies to provide against floods which are extraordinary or unprecedented.[90] It is clear that this statute establishes a rule that is

[75] Schattner v. Kansas City, 53 Mo. 102; Imler v. Springfield, 55 Mo. 119; Sexton v. St. Joseph, 60 Mo. 153; Wegman v. Jefferson City, 61 Mo. 55; Foster v. St. Louis, 71 Mo. 157; Werth v. City, 78 Mo. 107; Steinmeyer v. St. Louis, 3 Mo. App. 157; McInery v. St. Joseph, 45 Mo. App. 296.

[76] Separate opinion of Judge Wagner in Thurston v. St. Joseph, 51 Mo. 510; Donahoe v. Kansas City, 136 Mo. 657; Steinmeyer v. St. Louis, 3 Mo. App. 261.

[77] Gurno v. St. Louis, 12 Mo. 414; Schattner v. Kansas City, 53 Mo. 162; Imler v. Springfield, 55 Mo. 119; Wegman v. Jefferson City, 61 Mo. 55; Foster v. St. Louis, 71 Mo. 157; Stewart v. Clinton, 79 Mo. 603; Carson v. Springfield, 53 Mo. App. 239.

[78] 12 Mo. 414.

[79] 51 Mo. 510.

[80] Paragraph 21, Art. 2, Const. Mo. 1875.

[81] Werth v. City, 78 Mo. 107; Stewart v. Clinton, 79 Mo. 603; Householder v. City, 83 Mo. 488; Carrington v. St. Louis, 89 Mo. 208; Haney v. City, 94 Mo. 334; Sheehy v. K. C. Cable Ry., 94 Mo. 574; Carson v. Springfield, 53 Mo. App. 289.

[82] Donahoe v. Kansas City, 16 Mo. 657; Schmidt v. Rowse, 35 Mo. App. 288; Woods v. City, 58 Mo. App. 272.

[83] Woods v. City, 58 Mo. App. 272.

[84] Imler v. Springfield, 55 Mo. 119; McInery v. St. Joseph, 45 Mo. App. 296.

[85] Paragraph 2614, Rev. St. 1889.

[86] Kenney v. R. R., 69 Mo. App. 569.

[87] Field v. R. R., 21 Mo. App. 600; Kenney v. R. R., 69 Mo. App. 569.

[88] Field v. R. R., 21 Mo. App. 600; Collier v. R. R., 48 Mo. App. 398.

[89] Byrne v. R. R., 47 Mo. App. 383.

[90] Ellet v. R. R., 76 Mo. 518.

different from the one of the common law, for the statutory liability results from the mere failure of the railroad to construct the requisite ditches and drains and without the concurrence of further actual negligence on its part. Another statute[91] changes the common law rule to some extent. This statute applies only to land used for agricultural purposes, and permits an owner to secure proper drainage for his land by constructing drains into any natural depression which carries the water into a natural water course; and when he does so by constructing drains upon his own land, the owner of an adjoining tract through which such depression runs has not the right to obstruct the depression so as to prevent the drainage.[92]

There are also other provisions defining the liability for obstructing water courses,[93] and others requiring sewers in cities of certain classes to follow the lines of natural drainage.[94] These latter need no further mention for the purposes of this paper, but serve to illustrate the following point: That these statutory provisions all lean toward the civil law view of the repulsion of surface water.

GEO. H. ENGLISH, JR.

Kansas City, Mo.

[91] Sec. 4489, Rev. St. 1889.

[92] Gray v. Schriber, 52 Mo. App. 172.

[93] Kenney v. R. R., 74 Mo. App. 301, citing sec. 2593, Rev. St. 1899 (which is apparently the wrong section).

[94] Kansas City v. Swope, 79 Mo. 446.

CRIMINAL LAW—LARCENY—SIMILAR CRIME—EVIDENCE.

STATE v. O'DONNELL.

Supreme Court of Oregon, July 30, 1900.

Where, in a prosecution for larceny of a calf, the evidence showed that one jointly indicted with defendant had purchased from defendant the calf in question, together with two others, and afterwards sold all three, it was error to admit the testimony of a State's witness that one of the other calves had been stolen from him; it not appearing that the larceny of the second calf occurred in connection with the crime charged, or was committed at the same time or in the same locality.

MOORE, J.: The defendant Thomas O'Donnell was jointly indicted with James Roach for the alleged larceny of a cow and a calf, the property of one Allen Rhodes, of the value of $30 and $12, respectively, committed in Umatilla county, Oreg., October 25, 1898; and, having been separately tried, he was found guilty thereof, and from the judgment which followed he appeals.

The testimony introduced at the trial tended to show that Rhodes owned a black muley cow and her black muley bull calf, which were missed about October 20, 1898, and three or four weeks thereafter the cow was found about 15 miles from his place, in the defendant Roach's inclosed stubble field, and the calf's hide near Pendleton, at the slaughter house of Swartz & Greulich, to whom Roach sold the calf, with three others, which he purchased, with said cow and other cattle, from the defendant O'Donnell. The State called one A. D. Rhonimus, who, over the defendant's objection and exception, was permitted to testify that, having visited said slaughter house, he found a red hide, which he recognized as having been taken from a calf which he had missed, and which was included in the sale so made by Rhodes to Swartz & Greulich, and that he had never sold the calf, or authorized any one to take, kill, or flay it.

It is contended that the defendant having been charged with the larceny of a cow and a calf, the property of Rhodes, the court erred in admitting testimony tending to show the commission of an independent crime. "The general rule," says Mr. Justice Bean, in State v. Baker, 23 Oreg. 441, 32 Pac. Rep. 161, "is unquestioned that evidence of a distinct crime unconnected with that laid in the indictment cannot be given in evidence against the prisoner. Such evidence tends to mislead the jury, creates a prejudice against the prisoner, and requires him to answer a charge for the defense of which he is not supposed to have made preparation." The rule is well settled that evidence of the prisoner's participation in the commission of crimes wholly unconnected with that for which he is put upon trial is inadmissible. Greenl. Ev. § 52; Dunn v. State, 35 Am. Dec. 54; Rosenweig v. People, 63 Barb. 634; Bonsall v. State, 35 Ind. 460; Coleman v. People, 55 N. Y. 81; People v. Gibbs, 93 N. Y. 470; Barton v. State, 18 Ohio, 221. The rule that evidence of crimes other than that charged in the indictment is inadmissible is subject to a few exceptions, speaking of which, Mr. Underhill, in his valuable work on Criminal Evidence (section 87), says: "These exceptions are carefully limited and guarded by the courts, and their number should not be increased." The author gives five exceptions to such rule, which may be summarized as follows: (1) If several similar criminal acts are so connected by the prisoner, with respect to time and locality, that they form an inseparable transaction, and a complete account of the offense charged in the indictment cannot be given without detailing the particulars of such other acts, evidence of any or all of the component parts thereof is admissible to prove the whole general plan. State v. Roberts, 15 Oreg. 187, 13 Pac. Rep. 896; Phillips v. People, 57 Barb. 353; Hickam v. People, 137 Ill. 75, 27 N. E. Rep. 88; Turner v. State, 102 Ind. 425, 1 N. E. Rep. 869; Com. v. Robinson, 146 Mass. 571, 16 N. E. Rep. 452; People v. Foley, 64 Mich. 148, 31 N. W. Rep. 94; State v. Williamson, 106 Mo. 162, 17 S. W. Rep. 172; State v. Perry, 136 Mo. 126, 37 S.

W. Rep. 804; Brown v. Com., 76 Pa. St. 319. Mr. Justice Agnew, in Shaffner v. Com., 13 Am. Rep. 649, in commenting upon this exception, says: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish." (2) When the commission of the act charged in the indictment is practically admitted by the prisoner, who seeks to avoid criminal responsibility therefor by relying upon the lack of intent or want of guilty knowledge, evidence of the commission by him of similar independent offenses before or after that upon which he is being tried, and having no apparent connection therewith, is admissible to prove such intent or knowledge, which has become the material issue for trial. Yarborough v. State, 41 Ala. 405; People v. Sanders, 114 Cal. 216, 46 Pac. Rep. 153; Langford v. State, 33 Fla. 233, 14 South. Rep. 815; Stafford v. State, 55 Ga. 591; Anson v. People, 148 Ill. 494, 35 N. E. Rep. 145; Com. v. Bradford, 126 Mass. 42; People v. Henssler, 48 Mich. 49, 11 N. W. Rep. 804; Lindsey v. State, 38 Ohio St. 507; Goersen v. Com., 99 Pa. St. 388; State v. Habib, 18 R. I. 558, 30 Atl. Rep. 462; Zoldoske v. State, 82 Wis. 580, 52 N. W. Rep. 778. Mr. Justice Papallo, in People v. Corbin, 15 Am. Rep. 427, speaking of this exception, says: "The cases in which offenses other than those charged in the indictment may be proved, for the purpose of showing guilty knowledge or intent, are very few." (3) If the facts and circumstances tend to show that the prisoner committed an independent dissimilar crime, to enable him to perpetrate or to conceal an offense, such evidence is admissible against him upon an indictment charging the auxiliary crime, when the intent to perpetrate or conceal such offense furnished the motive for committing the crime for which he is put upon trial. State v. Watkins, 9 Conn. 47; Painter v. People, 147 Ill. 444, 35 N. E. Rep. 64; People v. Harris, 136 N. Y. 423, 33 N. E. Rep. 65; Templeton v. People, 27 Mich. 501; Pierson v. People, 79 N. Y. 424; Com. v. Ferrigan, 44 Pa. St. 386; People v. Stout, 4 Parker, Cr. R. 71; Crass v. State, 31 Tex. Cr. R. 312, 20 S. W. Rep. 579; Moore v. U. S., 150 U. S. 57, 14 Sup. Ct. Rep. 26, 37 L. Ed. 996. (4) When a crime has been committed by the use of a novel means or in a particular manner, evidence of the defendant's commission of similar offenses by the use of such means or in such manner is admissible against him, as tending to prove the identity of persons from the similarity of such means, or the peculiarity of the manner adopted by him. Frazier v. State, 135 Ind. 38, 34 N. E. Rep. 817; Com. v. Choate, 105 Mass. 451; Brown v. State, 26 Ohio St. 176. (5) When a prisoner is charged with any form of illicit sexual intercourse, evidence of the commission of similar crimes by the same parties is admissible to prove an inclination to commit the act for which the accused is put upon his trial. Bish. St. Crimes, § 679: State v. Scott, 28 Oreg. 331, 42 Pac. Rep. 1; McLeod v. State, 35 Ala. 395; People v. Patterson, 102 Cal. 239, 36 Pac. Rep. 436; Lefforge v. State, 129 Ind. 551, 29 N. E. Rep. 34; State v. Williams, 76 Me. 480; Com. v. Nichols, 114 Mass. 285; People v. Skutt, 96 Mich. 449, 56 N. W. Rep. 11; State v. Marvin, 35 N. H. 22; State v. Pippin, 86 N. Car. 646; Com. v. Bell, 166 Pa. St. 405, 31 Atl. Rep. 123. An examination of these deviations from the general rule will show that the testimony objected to herein, if allowable, falls within the first exception hereinbefore noted. That the taking of the two calves, if it be assumed that the same person was guilty thereof, constituted similar criminal acts, must be admitted, but the testimony fails to show that they were taken at or near the same time, or from the same locality; for Rhonimus testified that he had not seen the calf which he lost for about four weeks prior to the time he missed it, and that the distance from Rhodes' place to that from which his calf was taken is about six or seven miles. In Hall v. People, 6 Parker, Cr. Rep. 671, the accused was tried upon an indictment charging him with burglariously entering in the nighttime the barn of one John Gaston, and feloniously taking therefrom a set of harness, a lap robe, net, blanket, whip, and umbrella, which property, the evidence showed, was found in his possession. The prosecution was permitted to prove, over objection and exception, that other property stolen from one Peter P. Shoonmaker two or three weeks prior to the burglary was found in the prisoner's possession, and it was held that the court erred in admitting such testimony. In Gilbraith v. State, 41 Tex. 567, the plaintiff in error was tried upon an indictment charging him with larceny of a blue dun bull the property of one W. J. Myers; and at the trial a butcher testified that he purchased from the prisoner the hide taken from said animal, and also, over the objection and exception of the accused, stated that at the same time he purchased from the latter the hide of a red steer which was identified as the property of one Jack Russell, and it was held that the court erred in admitting the testimony so objected to. In Ivey v. State, 43 Tex. 425, it was held that on a trial for the theft of cattle the State cannot prove the possession by the accused of stolen cattle other than those described in the indictment, unless it be shown that they were taken at the same time and by the same persons. In Beach v. State (Tex. App.), 11 S. W. Rep. 832, the prisoner having been indicted for the larceny of cattle, it was held that the court erred in admitting evidence of the defendant's theft of a yearling which was not shown to have been committed at the same time and place as that charged in the indictment. To the same effect, see Welhousen v. State, 30 Tex. App. 623, 18 S. W. Rep. 300; Schwen v. State, 37 Tex. Cr. Rep. 368, 35 S. W. Rep. 172.

In the case at bar, the testimony not having disclosed that Rhonimus' calf was taken at the same time or from the same locality as the calf

described in the indictment, and it having been possible to give a complete account of the latter crime without referring to other calves that may have been stolen, the court erred in admitting the testimony so objected to. Other alleged errors are assigned, but, believing that they are not likely to be repeated at a second trial, they will not be further noticed. The judgment is reversed, and a new trial ordered.

NOTE.—*Recent Decisions on Admissibility of Evidence of Other Crimes in Criminal Prosecutions.*—Pen. Code, sec. 1093, provides that, in cases where the indictment charges a previous conviction, and defendant has confessed the same, the clerk, in reading it, shall omit therefrom all that relates to such previous conviction. Held, that it was error to admit testimony tending to show a previous conviction, defendant having confessed the same. People v. Thomas, 110 Cal. 41, 42 Pac. Rep. 456. On a prosecution for procuring a certain person to falsely register as a voter in a precinct, others may testify that defendant also procured them to falsely register. People v. Sternberg (Cal.), 43 Pac. Rep. 198. On the trial of a defendant charged with crime, evidence of the commission by him of another similar crime, or of an attempt to commit another, is not admissible in proof of the substantive act charged; but where there is evidence tending to prove such act, but leaving room for questions as to the intent with which it was done, evidence of other similar acts may be admitted to be considered on that issue alone. People v. Thacker (Mich.), 66 N. W. Rep. 562. Admissions made by defendant before the homicide as to the commission of other independent crimes, in order to induce a third person to take part in the commission of the homicide, were properly admitted. State v. Hayward (Minn.), 65 N. W. Rep. 63. On trial for unlawfully disposing of mortgaged goods with intent to defeat the rights of the mortgagee, evidence that, five months after the offense was committed, defendant attempted to dispose of other property covered by the mortgage, is inadmissible, on the question of intent. State v. Jeffries, 117 N. Car. 727, 23 S. E. Rep. 163. It is proper, in a criminal case, to prove the commission by the accused of another and collateral crime, where such crime furnishes a motive for the commission of the crime for which the accused is being tried. State v. Pancoast (N. Dak.), 67 N. W. Rep. 1052. For the purpose of showing motive, the remoteness in point of time of the commission of the collateral crime cannot be considered; the sole question being whether it furnished an active, existing motive for the commission of the crime for which the party is on trial. State v. Pancoast (N. Dak.), 67 N. W. Rep. 1052. On a trial for unlawfully and without license prescribing medicine for a certain person, evidence that defendant had prescribed for others is inadmissible. Meyer v. State (N. J. Sup.), 36 Atl. Rep. 483. Upon a trial for keeping a disorderly house, it is error to allow questions concerning the trial of another case, in another State, against another person, where the character of a house in that State owned by the defendant was in question, and where no relation of intercommunication or management is shown or alleged. Parks v. State (N. J. Err. & App.), 36 Atl. Rep. 935. In the prosecution of a police captain for extortion by threats made by an inferior officer, evidence to show that in other extortions, from other persons, the inferior officer was acting for defendant, is inadmissible to show that in the extortion in question he was acting as defendant's agent. People v. McLaughlin, 150 N. Y. 365, 44 N. E. Rep. 1017. Evidence showing more than one act of intercourse was admissible in a prosecution for carnally knowing a female child under 16 years of age. State v. Robinson (Oreg.), 48 Pac. Rep. 357. On trial for burglary, it was error to allow the State to prove the details of extraneous crimes not shown to be connected with the offense in issue. Ware v. State (Tex. Cr. App.), 38 S. W. Rep. 198. In a prosecution for the theft of a cow, evidence of the thefts of other cows by defendant, all of which were taken at different times, varying from ten days to two weeks apart, is inadmissible. Buck v. State (Tex. Civ. App.), 38 S. W. Rep. 772. On a trial for selling liquors to a minor, evidence of sales to other minors is inadmissible. Freedman v. State (Tex. Cr. App.), 38 S. W. Rep. 993. In a trial of a defendant charged with having forged and uttered a draft, evidence that the person whose name purported to be signed to such draft had, prior to its date, been murdered by defendant, is pertinent and material, both as tending to prove that the instrument was forged, and also the knowledge of its false character by defendant when he uttered it; and it is not rendered inadmissible by the fact that it tends to prove the commission by defendant of a separate crime. People v. Sanders, 114 Cal. 216, 46 Pac. Rep. 153. On a trial for conspiracy to obtain money by false pretenses, evidence that other persons were induced to part with their money by the fraudulent means directed against prosecutor was admissible against defendants. Orr v. People, 63 Ill. App. 305. Defendants were following a show from place to place, for the common purpose of stealing and picking pockets, and followed it to a place where, pursuant to the common object, as a joint indictment of them alleged, they attempted robbery. Held, that evidence of their conduct shortly before and after the alleged offense was admissible, although it tended to show other crimes than that charged, it not having been admitted for that purpose. Williams v. People, 166 Ill. 132, 46 N. E. Rep. 749. On the trial of an officer charged with cheating by false pretenses, by filing and collecting from the county a claim for money falsely claimed by him to have been paid out for transportation for poor persons, evidence of the collection of other similar fraudulent claims by defendant is admissible on the question of intent, both as showing knowledge of the character of the claim, and that the act charged was part of a systematic scheme to defraud. State v. Brady (Iowa), 69 N. W. Rep. 290, 36 L. R. A. 693. Under an indictment against a bank cashier for making false entries with intent to defraud the bank, guilty intent being essential to constitute the offense, proof of other entries by defendant similar to the one charged is admissible to show such intent. Shipp v. Commonwealth (Ky.), 41 S. W. Rep. 856. On a trial for robbery by impersonating an officer, and obtaining property under a threat of arrest, evidence of a second robbery by defendant soon after, and under similar circumstances, is admissible. State v. Balch, 136 Mo. 103, 37 S. W. Rep. 808. On a trial for attempting to corrupt a juror, testimony of other jurors that defendant attempted to corrupt them is admissible to explain his purpose in approaching the juror. State v. Williams, 136 Mo. 293, 38 S. W. Rep. 75. On a trial for larceny by aid of false and fraudulent representations, evidence of similar transactions by defendants is admissible to show intent. People v. Wicks (Sup.), 42 N. Y. S. 630, 11 App. Div. 539. In a prosecution for assault with in-

tent to rape, evidence is admissible of similar previous assaults upon prosecutrix by defendant. Hanks v. State (Tex. Cr. App.), 38 S. W. Rep. 173. In a prosecution for illegal sales of liquor, evidence of other sales than that charged in the indictment is admissible to show the system of defendant with reference to selling liquor, and that the sale charged was in accordance with such system. Pitner v. State (Tex. Cr. App.), 39 S. W. Rep. 662. On a trial for uttering a forged vendor's lien note, which was a duplicate of a genuine note previously made to defendant, the defense being that the note was genuine, and given in lieu of the original, the State may show that defendant had taken vendor's lien notes from other parties, and then forged and negotiated duplicates, though such transactions were not connected with that on trial, and occurred both before and after it, covering a period of about a year. McGlasson v. State (Tex. Cr. App.), 40 S. W. Rep. 503. It is improper to go into records of former convictions of crime, offered as evidence in a criminal case, and to retry the issues there decided. Waters v. State (Ala.), 22 South. Rep. 490. That evidence that one accused of murder was found under the bed of a woman at night two days before the murder, and, on being discovered, ran away, may tend to prove at attempt on the part of defendant to commit another offense, and may, therefore, tend to the prejudice of defendant in the minds of the jurors, is no ground for its exclusion. People v. Ebanks, 117 Cal. 652, 49 Pac. Rep. 1049, 40 L. R. A. 269. A city marshal called by the State to prove the flight of accused was permitted to testify that he had been looking for accused for about two weeks before the crime in question was committed, and from other parts of his testimony it appeared that he wanted to and did arrest him for a different crime than that charged, and wholly disconnected from it. Held, that the admission of such testimony was error. People v. Vidal (Cal.), 53 Pac. Rep. 558. Evidence which tends to show defendant's consciousness of guilt of another offense by efforts to destroy evidence thereof, or to fabricate evidence tending to show his innocence of that offense, is inadmissible. People v. Freeman, 50 N. Y. S. 984, 25 App. Div. 583. Evidence that defendant was guilty of an arson committed after the arson for which he is being tried is inadmissible. State v. Graham (N. Car.), 28 S. E. Rep. 409. Confessions of defendant as to other crimes, not connected with the one charged, are not competent evidence against him. Commonwealth v. Wilson, 186 Pa. St. 1, 42 W. N. C. 285, 40 Atl. Rep. 283. Defendant, while a witness, was asked by the State if he knew a certain woman named, and if he had not at one time driven seven head of a certain brand of cattle from her house to his residence; and he answered that he had not. Held, that the question and answer were not objectionable, as tending to show that he was guilty of an offense other than the one charged in the indictment, where the State offered no evidence that he had driven such cattle. Taylor v. State (Tex. Cr. App.), 42 S. W. Rep. 285. In a criminal prosecution for slander by imputing to prosecutrix a want of chastity, evidence that defendant had said of a certain other female that "she had been pregnant a time or two" was inadmissible. Tippens v. State (Tex. Cr. App.), 43 S. W. Rep. 1000. The admission of evidence of the theft of other cattle than the ones in question, and at a different time, the defacement of their brands, and of their sale by accused, as the agent of a third person, supposedly the thief, not showing any connection with the present offense, is error. Unsell v. State, 45 S. W. Rep. 1022. Evidence that on a prior occasion defendant, charged with making and uttering a fictitious order for the payment of money, wrote a check under an assumed name, is not admissible. People v. Arlington (Cal.), 55 Pac. Rep. 1003. Evidence of any fact, with its circumstances, even though amounting to a distinct crime committed by defendant, if it has a relevant bearing on the issue being tried, is admissible. Roberson v. State (Fla.), 24 South. Rep. 474. Except in cases where it is necessary to show guilty knowledge on the part of the prisoner, it is not competent for the State to prove that, at another time and place, he committed, or attempted to commit, a crime similar to that for which he is now on trial. Morgan v. State (Neb.), 77 N. W. Rep. 64. Evidence relevant and material to the issues is admissible, regardless of whether it shows the commission of other crimes. State v. Davis (N. H.), 41 Atl. Rep. 267. The fact that a transaction tends to prove another crime does not render it inadmissible where it is otherwise material or relevant. People v. Van Tassel, 156 N. Y. 561, 51 N. E. Rep. 274. When the existence of fraud, as an element of crime, is in issue, evidence of other acts and doings of defendant of a kindred character are admissible, in order to illustrate or establish the intent or motive in doing the particular acts in question. United States v. Kenney (U. S. C. C.), 90 Fed. Rep. 257. Defendant, who was accused of stealing a mule, confessed that he and another person caught another mule and a horse on the same night they caught the mule in question, and that the other person had told him that he did not know who owned the mules, and that he would give defendant half the money for which he sold them. Held, that the jury could consider the evidence of the other offenses to connect defendant with the theft in question. Tidwell v. State (Tex. Cr. App.), 48 S. W. Rep. 184, denying rehearing 47 S. W. Rep. 466.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTION—Real Party in Interest.—Under Code, § 28, providing that actions shall be in the name of the real party in interest, an action by a trustee is in the name of the real party in interest, since he is entitled to the money, and can discharge the debtor, though the money, when collected, is held for the benefit of another.—HALL v. HENDERSON, Ala., 28 South. Rep. 531.

2. APPEAL—Decree for Distribution—Modification.—Under Hill's Ann. Laws, § 545, providing that, where a judgment or decree is reversed or modified by the appellate court, it "may direct complete restitution of

all property and rights lost thereby," the appellate court will merely direct restitution, and remand the cause to the court below for enforcement of the order, if the right to restitution depends entirely on matters outside the record.—McFADDEN v. SWINERTON, Oreg., 62 Pac. Rep. 12.

3. ATTACHMENT — Legal and Equitable Actions.—Where a complaint sought to obtain judgment for moneys alleged to be due for goods sold and delivered to a defendant, and to set aside his alleged void assignment or transfer of a stock of goods, it was error to set aside an attachment because such action was for equitable relief only, since, under the Code, legal and equitable causes of action may be united in the same complaint; and such complaint stated a cause of action at law for goods sold and delivered, on which judgment could be rendered independent of the equitable relief sought, and hence was sufficient to justify a resort to attachment.—FERST v. POWERS, S. Car., 36 S. E. Rep. 744.

4. ATTORNEY AND CLIENT — Creation of Relation.—Where defendant consulted an attorney, and was advised by him with respect to filing a lien, the relation of attorney and client was established thereby.—PERKINS v. WEST COAST LUMBER CO., Cal., 62 Pac. Rep. 57.

5. BANKRUPTCY—Action by Trustee after Closing of Estate.—Where a cause of action accrued to one who had been adjudged bankrupt, and the trustee in bankruptcy commenced an action thereon, and before trial an offer of composition was confirmed, and an order made discharging the trustee and closing up the estate, the court properly refused to dismiss the suit owing to the closing of the estate and the vesting of the right of action in the bankrupt, where it appeared that the suit was being prosecuted by the trustee with the consent of the bankrupt, and for his benefit, since a judgment recovered under such circumstances would be a bar to any other suit for the same cause of action.—STONE v. JENKINS, Mass., 57 N. E. Rep. 1002.

6. BANKRUPTCY—Assets—Estate in Remainder.—Under a devise to S during life, with remainder to her husband, provided that upon the death of either of such devisees the share so devised to him shall be equally divided between his children if living, the husband has an interest in the property devised, during the life of S and while having children living, that should be included in his schedule of assets in proceedings in bankruptcy.—IN RE SHENBERGER, U. S. D. C., N. D. (Ohio), 102 Fed. Rep. 978.

7. BANKRUPTCY — Discharge of Bankrupt—Concealment of Assets.—Where, after allowing a bankrupt every possible credit, his schedule of assets shows a shrinkage in his property of from ten to thirteen thousand dollars in nine months, which is unaccounted for, the presumption of fraudulent concealment of assets will prevent his receiving a discharge in bankruptcy.—IN RE CASHMAN, U. S. D. C., S. D. (N. Y.), 103 Fed. Rep. 67.

8. BANKRUPTCY—Discharge — Corporations.—Under Bankr. Act 1898, a corporation which has been adjudged bankrupt is entitled to a discharge in all respects as an individual bankrupt would be.—IN RE MARSHALL PAPER CO., U. S. C. C. of App., First Circuit, 102 Fed. Rep. 872.

9. BANKRUPTCY — Discharge — Fraudulent Concealment of Property.—Under Bankr. Act 1898, § 29b, authorizing the discharge of a bankrupt unless he knowingly and fraudulently conceals any of the property belonging to his estate while a bankrupt, the mere concealment of property by the bankrupt is not ground for denying a discharge, if it was not done knowingly and fraudulently.—IN RE PIERCE, U. S. D. C., N. D. (N. Y.), 103 Fed. Rep. 64.

10. BANKRUPTCY—Involuntary Proceedings—Who Are Creditors.—Under Bankr. Act 1898, § 1, subd. 9, and section 63b, defining a creditor as one who owns a demand or claim provable in bankruptcy, and providing that unliquidated claims may be proved and allowed only after being liquidated, one having an unliquidated demand against an insolvent debtor is not such a creditor as is entitled to institute involuntary proceedings to have his debtor adjudged a bankrupt.—IN RE BRINCKMANN, U. S. D. C., D. (Ind.), 103 Fed. Rep. 65.

11. BANKRUPTCY—Jurisdiction.—Upon the filing of a petition in bankruptcy by one individually and as surviving partner of a late co-partnership, the bankruptcy court has complete jurisdiction over the partnership estate, although such estate, together with the personal estate of the deceased partner, was in course of administration in a State court before the petition in bankruptcy was filed, provided possession of the partnership assets can be obtained by the referee without forcibly interfering with the custody of the administrator.—IN RE PIERCE, U. S. D. C., D. (Wash.), 102 Fed. Rep. 977.

12. BANKRUPTCY — Landlord's Lien for Rent.—Under the laws of Pennsylvania (Act June 16, 1836; P. L. 777), which give a landlord a lien on goods and chattels being in or upon any message and liable to distress of the landlord, a landlord is not entitled to priority of payment of rent due from a bankrupt out of the proceeds of a license to the bankrupt to sell liquors upon the demised premises, such license not being property subject to execution or to distress under the laws of the State.—IN RE MYERS, U. S. D. C., D. (Penn.), 102 Fed. Rep. 869.

13. BANKRUPTCY — Opposition to Discharge.—Where a bankrupt's application for discharge, with specifications in opposition thereto by creditors, alleging that he had sworn falsely, in his original examination at the first meeting of creditors, with reference to his assets, is referred to the referee to ascertain and report the facts, the record of such examination of the bankrupt is not admissible in evidence on behalf of the objecting creditors, and should not be received by the referee nor included in his report to the court.—IN RE LOGAN, U. S. D. C., D. (Ky.), 102 Fed. Rep. 876.

14. BANKRUPTCY—Preferences—Recovery by Trustee.—Money collected on execution and received by the creditor before the filing of a petition in bankruptcy against the debtor, but within four months prior thereto, although it constitutes a preference, within Bankr. Act 1898, § 60a, cannot be recovered back by the trustee, under section 60b, unless it is shown that the creditor had reasonable cause to believe that a preference was intended.—IN RE BLAIR, U. S. D. C., S. D. (N. Y.), 102 Fed. Rep. 987.

15. BANKS—Deposits—Right to Apply to Note of Depositor.—A bank has the right to charge to the account of a general depositor the amount of notes of such depositor held by it which are due, and such right is not affected by the fact that the depositor is the receiver of a railroad, and as such made the deposits, where he also executed the notes in the same capacity.—DURKEE v. NAT. BANK OF FLORIDA, U. S. C. C. of App., Fifth Circuit, 102 Fed. Rep. 845.

16. BANKS—Drafts Deposited for Collection—Effect of Bank's Insolvency.—Checks and drafts delivered by a depositor to a bank for collection and deposit at a time when the bank was insolvent, and known to be so by its officers, and which had not been collected when the bank closed its doors, remain the property of the depositor, although they were indorsed to the bank without qualification, and on their subsequent collection by the receiver the proceeds may be recovered from him by the depositor.—RICHARDSON v. NEW ORLEANS COFFEE CO., U. S. C. C. of App., Fifth Circuit, 102 Fed. Rep. 785.

17. BANKS — Receiving Deposit When Insolvent.—When a bank receives a deposit after hopeless insolvency, the fraud avoids the implied contract between the parties by which the relation of debtor and creditor would ordinarily arise, and prevents the money deposited from becoming the property of the bank, and a trust is the equitable result.—RICHARDSON v. NEW ORLEANS DEBENTURE REDEMPTION CO., U. S. C.

C. of App., Fifth Circuit, 102 Fed. Rep. 780.

18. BENEFICIAL ASSOCIATIONS—Benefits—By Laws.—A by-law of a beneficial association, directing that if, on the death of a beneficiary selected by a member before his demise, such member make no further disposition thereof, the benefit shall be paid to his family, and, if none, to his next of kin, is consistent with its charter providing that on a member's death there may be paid a certain sum to his family, or as he may direct; hence, where a beneficiary dies, and the member, having no family, designates no other before his death, the benefit will go to the next of kin.—PEASE V. SUP. ASSEM. ROYAL SOC. OF GOOD FELLOWS, Mass., 57 N. E. Rep. 1003.

19. BROKERS — Action for Compensation.—A broker employed to secure a loan is entitled to his commissions when he procures a person who is willing to lend the amount desired, though no contract is actually made, because of the invalidity of the title to the property offered as security.—FITZPATRICK V. GILSON, Mass., 57 N. E. Rep. 1000.

20. BROKERS — Mines—Sale — Parol Contract.—Civ. Code, § 1624, provides that parol agreements authorizing an agent or broker to purchase or sell real estate for compensation or commission shall be invalid. A mine owner gave an option on his mine to a third party, and, fearing that it might not be taken under the option, employed plaintiff, an experienced miner, by oral agreement, to assist him in bringing about the sale. Held, in a suit to recover the contract price for plaintiff's services, that the contract was invalid, under the statute, though plaintiff was not engaged in the real estate business.—DOLAN V. O'TOOLE, Cal., 62 Pac. Rep. 92.

21. CANCELLATION OF INSTRUMENTS—Action.—Plaintiff purchased certain personal property at execution sale. Defendant claimed the property under a chattel mortgage, and executed a bond to the sheriff at the sale, and received the property. Plaintiff sued to have the defendant's mortgage canceled as usurious. Held, that the action could not be maintained, plaintiff never having been in possession of the property.—TURNER V. MERCHANTS' BANK, Ala., 28 South. Rep. 469.

22. CARRIERS—Passenger—Burden of Proof as to Negligence.—The rule which requires an employee suing his employer for an injury to allege and prove the negligence upon which the right of recovery is based does not apply to a suit by a passenger against a common carrier, in which case the fact of the injury while the passenger was himself in the exercise of due care raises a presumption of negligence on the part of the carrier, which casts upon it the burden of proving the exercise of proper care, and that it used all appliances, readily attainable, known to science for the prevention of accidents.—WHITNEY V. NEW YORK, ETC. R. CO., U. S. C. C. of App., First Circuit, 102 Fed. Rep. 850.

23. CONSTITUTIONAL LAW — Health—Validity of Regulations.—A large discretion is necessarily vested in State or municipal authorities in determining what is a proper exercise of the police powers of the State for the protection of the public health, and what measures are necessary to meet particular conditions or emergencies; but their determination is not final, and is subject to supervision by the courts. They may not, under the guise of protecting the public, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations, and whether they have done so in a particular case is a judicial question.—JEW HO V. WILLIAMSON, U. S. C. C., N. D. (Cal.), 103 Fed. Rep. 10.

24. CONSTITUTIONAL LAW—Right of Assembly—Primary Election Law.—St. 1899, p. 47, known as the "Primary Election Law," providing an exclusive scheme, controlling political parties in holding their conventions for the nomination of candidates to public office, but denying the benefits of the act to all political parties which did not cast at the next preceding election at least 3 per cent. of the total vote, is in conflict with Const. art. 1, §§ 10, 11, 21, giving the people the right to freely assemble together to consult for the common good, and providing that no citizen or class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens, and that all laws of a general nature shall have a uniform operation, since it not only discriminates between political parties and the members thereof, but works the disfranchisement of voters, or compels them, if they vote at all, to vote for representatives of a political party other than that to which they belong.—BRITTON V. BOARD OF ELECTION COMRS. OF CITY AND COUNTY OF SAN FRANCISCO, Cal., 61 Pac. Rep. 1115.

25. CONTRACT—Building Contracts — Acceptance.—When one who contracted to erect a building did so in substantial compliance with the terms of his contract, turned it over to the owner, received full payment for his services, and was discharged by the latter, the relation of owner and contractor between the two was at an end, whether the building in all respects conformed to the plans and specifications agreed upon or not.—SHEEHAN V. SOUTH RIVER BRICK CO., Ga., 36 S. E. Rep. 759.

26. CONTRACT—Consideration.—A contract made by a parent with her daughter and the latter's intended husband, to the effect that if the contemplated marriage is solemnized, and the husband will expend the necessary amount of money in building a dwelling house upon a vacant lot belonging to the mother, she will convey the lot to the daughter, is supported by a sufficient consideration.—BELL V. SAPPINGTON, Ga., 36 S. E. Rep. 780.

27. CONTRACT—Rescission—Return of Consideration.—CIV. Code, § 1691, provides that one party cannot rescind a contract without the consent of the other party unless he restores to the latter everything of value which he has received from him thereunder. A corporation which owed $46,650 to his principal stockholder borrowed money from a bank, and, in consideration of his guarantying its note, paid its indebtedness to him before maturity. Held, in an action by other stockholders to compel repayment to the corporation, that the action could not be maintained without releasing the principal stockholder from his guaranty.—WILLS V. PORTER, Cal., 61 Pac. Rep. 1109.

28. COVENANTS—Quiet Enjoyment — Ouster.—Assertion of adverse title by tenants of the plaintiff after expiration of lease, and recovery of judgment by such tenants, quieting their title as against the plaintiff and his grantor, are held to constitute a sufficient ouster of the plaintiff from possession of the land to entitle him to recover upon a covenant for quiet enjoyment.—CHRISTY V. BEDELL, Kan., 61 Pac. Rep. 1095.

29. CORPORATION—Assignment for Creditors.—The provision in a corporation's assignment for creditors, executed by the directors, that any surplus should be divided among the stockholders, is *ultra vires*, since the surplus belongs to the corporation.—STATE V. MITCHELL, Tenn., 58 S. W. Rep. 865.

30. CORPORATION—Debts—Stockholders.—Under Civ. Code, § 1473, providing that performance of an obligation by one on behalf of the party whose duty it was to perform it, and with his assent, if accepted by the creditor, extinguishes it, an indorser of a corporation's note, who paid the same and took an assignment thereof from the payee, was not entitled to maintain an action thereon, since the debt was extinguished, and hence he could not enforce the statutory liability of stockholders for such debt.—YULE V. BISHOP, Cal., 62 Pac. Rep. 68.

31. CORPORATIONS — Liability of Stockholders—Limitations.—Gen. St. Kan. ch. 23, § 44, provides that if a corporation be dissolved, leaving debts unpaid, suits may be brought against stockholders. *Id.* par. 1200, provides that, as to creditors seeking to enforce additional liability of stockholders, the corporation shall be deemed dissolved if it has suspended business for more than one year. Held, that limitations against

the enforcement of such liability begin to run at the expiration of a year for such suspension, whether the claim against the corporation has been reduced to judgment or not, since the creditor may immediately proceed against the stockholders on the dissolution of the corporation, without waiting to obtain a judgment against the corporation.—SEATTLE NAT. BANK v. PRATT, U. S. C. C., N. D. (N. Y.), 103 Fed. Rep. 62.

32. CORPORATIONS—Transfer of Property—Validity.—A corporation may not transfer all its property to another corporation, and take in payment therefor the stock of such corporation, without the unanimous consent of its stockholders, and hence such transfer will be set aside at the suit of a non assenting stockholder.—MORRIS v. ELYTON LAND CO., Ala., 28 South. Rep. 513.

33. CRIMINAL EVIDENCE — Opinion Evidence—Homicide.—A medical expert, after describing a wound and its location, and giving his opinion as to the character of the weapon by which it was caused, may testify to the opinion that the blow came from the rear of the injured person. Any witness, after examining a physical instrument, may testify to the opinion that it is a deadly weapon.—PERRY v. STATE, Ga., 36 S. E. Rep. 781.

34. CRIMINAL LAW — Entry of Judgment.—A journal entry of judgment in a criminal case cannot be amended after the sentence, as stated in such journal entry, has been fully served, and the fine and costs paid, by adding thereto a penalty for failure to give the good-behavior bond provided for in the statute.—STATE v. MCBEE, Kan., 61 Pac. Rep. 1092.

35. CRIMINAL LAW—False Pretenses.—When one, by using any deceitful means or artful practice, other than those which are mentioned specifically in the Penal Code, obtains the money or goods of another, the offense forbidden by Pen. Code, § 670, is complete as soon as the owner is thus deprived of his property, and subsequent repentance and restitution on the part of the wrongdoer will constitute no bar to a prosecution against him.—LOWE v. STATE, Ga., 36 S. E. Rep. 856.

36. CRIMINAL LAW—Insanity—Presumption.—Where the defense of insanity is interposed to a criminal prosecution, it is proper to instruct that if the defendant is shown to have been permanently insane before the crime, the presumption would be that it continued and existed at the time of the offense, but that by "permanently insane" is meant insanity not due to a temporary cause, such as delirium tremens, fever, or the like.—KELLOGG v. UNITED STATES, U. S. C. C. of App., Sixth Circuit, 103 Fed. Rep. 200.

37. CRIMINAL LAW—Instruction.—Const. art. 6, § 19, declares that judges shall not charge juries with respect to matters of fact. Held, that where, on a prosecution for murder, the jury were instructed that, though there was no evidence of a motive on the part of accused for the commission of the offense charged, there may nevertheless have been a motive undisclosed, and, the evidence relied on to convict being circumstantial, were charged that circumstantial evidence has the advantage of direct evidence, because not likely to be fabricated, the instructions were improper, under Const. art. 6, § 19, since they intimated the court's view of the sufficiency of the evidence.—PEOPLE v. VERENESENECKOCKOCKHOFF, Cal., 62 Pac. Rep. 111.

38. CRIMINAL LAW—Larceny—Ownership of Property.—While possession is sufficient *prima facie* proof of the ownership of land to support an indictment for stealing the timber from it, the mere fact that one not in possession, but claiming to own the land, instructed another, who was also not in possession, to look after it, and keep off trespassers, was not sufficient proof of possession, in the absence of the exercise of any act of ownership, to support such an indictment.—CARL v. STATE, Ala., 28 South. Rep. 505.

39. CRIMINAL LAW—Train Robberies—Indictment.—Rev. St. 1899, § 1955, declares that any person who shall place upon any railroad track any obstruction or explosive substance, or shall remove, destroy, or injure any rails, ties, or switch from bridge or trestle, or shall stop any train with the intent to commit robbery, shall be punished by death or confinement in the State prison. Held that, under the statute, a conviction was proper, although the offender did not so impair the railroad track as to endanger the entire passenger train and the lives of the people thereon.—STATE v. STUBBLEFIELD, Mo., 58 S. W. Rep. 337.

40. DEATH BY WRONGFUL ACT—Damages—Evidence.—In an action under Code 1896, § 27, providing that the personal representatives of one killed by a wrongful act may recover such damages as the jury may assess, evidence of the age, physical and mental condition, earning capacity, and occupation of deceased, and the amount contributed by him to the support of those dependent on him, was properly rejected as irrelevant, since the act is not compensatory, but punitive in its nature.—LOUISVILLE & N. R. CO. v. TEGNOR, Ala., 28 South. Rep. 510.

41. DEATH BY WRONGFUL ACT—Punitive Damages—Alabama Statute.—Under the statutes of Alabama (Code, §§ 26, 27), the personal representative of a deceased minor child, in an action against the receivers of a railroad to recover for the death of his intestate through the wrongful act or negligence of defendants, or their servants, may recover punitive damages.—MCGHEE v. MCCARLEY, U. S. C. C. of App., Fifth Circuit, 103 Fed. Rep. 55.

42. DEATH BY WRONGFUL ACT—Release by Party Injured—Effect.—An action for the homicide of a husband or father, alleged to have been occasioned by a physical injury, is not maintainable when it appears that he, while in life, voluntarily settled with the wrongdoer therefor, and discharged the latter from all the liability for the damages resulting therefrom.—SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. CASSIN, Ga., 36 S. E. Rep. 881.

43. DEBTOR AND CREDITOR—Compromise with Creditors—Secret Agreement.—When one of several creditors of a common debtor who is in failing circumstances ostensibly agrees with the other creditors and the debtor upon a compromise and settlement of all their claims at a specified per cent. on the dollar, and the creditor first referred to, by a secret arrangement with the debtor, of which the other creditors are kept in ignorance, obtains from him money and promissory notes in addition to what is paid under the terms of the general settlement, this latter transaction is in law fraudulent, the notes given in pursuance thereof are void, and the debtor may recover the money paid in pursuance of the secret preference thus given.—BROWN v. EVERETT-RIDLEY-RAGAN CO., Ga., 36 S. E. Rep. 813.

44. DIVORCE — Cruel Treatment — Evidence.—Cruel and inhuman treatment by a husband may be shown by compulsory excessive intercourse, injuring the health of his wife, a woman of delicate health.—GARDNER v. GARDNER, Tenn., 58 S. W. Rep. 342.

45. EQUITY—Suit by Receiver against Stockholders.—Equity is without jurisdiction of a suit by the receiver of an insolvent corporation against numerous stockholders to recover an additional liability imposed by statute, on the single ground that a multitude of actions at law will thereby be avoided, where the amount of the assessment has been previously adjudicated in a general suit, and has been fixed at the full amount of the statutory liability, since no question remains in which the defendants have a common interest, and the suit is merely an aggregation of separate suits, each involving separate issues and having little relation to each other, except that there is a common plaintiff, and in each of which the remedy at law is adequate.—HALE v. ALLINSON, U. S. C. C., E. D. (Penn.), 102 Fed. Rep. 790.

46. EXECUTORS AND ADMINISTRATORS—Judgments—Collateral Attack.—Where a judgment *de bonis testatoris*

is obtained against an executor, execution issued thereon, a return of *nulla bona* made by the sheriff, and a suit brought on the judgment against the executor personally, suggesting a *devastavit*, the executor cannot, in his defense to the suit, make a collateral attack upon the judgment by showing fraud or mistake in its rendition; and this is true although the judgment was rendered by the same court in which the suit thereon is pending.—PORTER v. ROUNTREE, Ga., 36 S. E. Rep. 761.

47. EXTRADITION—Habeas Corpus.—In proceedings for the extradition of one charged in the complaint with being a fugitive from the justice of a foreign country, and with the commission of an extraditable offense under the treaty between such country and the United States, where the commissioner before whom the hearing is had has jurisdiction of the person of the accused, his finding of probable cause is open on *habeas corpus* only to the inquiry whether there was legal evidence before him on which to exercise his judgment, and not as to the sufficiency of such evidence.—IN RE COUNT DE TOULOUSE LAUTREC, U. S. C. C. of App., Seventh Circuit, 102 Fed. Rep. 878.

48. FEDERAL COURTS — Jurisdiction — Assignee of Chose in Action.—Under the provision of section 1 of the judiciary act of 1887-88, that no federal court shall have cognizance of a suit to recover the contents of any promissory note or other chose in action "in favor of any assignee or any subsequent holder, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made," if the requisite diversity of citizenship existed between the original parties to a note or contract, and a suit between them might have been maintained thereon in a federal court, any subsequent assignee may maintain such action, provided he is also a resident of a State other than that in which the defendant resides; and it is immaterial that an intermediate assignee was a resident of the same State.—PORTAGE CITY WATER CO. v. CITY OF PORTAGE, U. S. C. C., W. D. (Wis.), 102 Fed. Rep. 769.

49. FEDERAL COURTS — Jurisdiction — Citizenship.—The fact that merely formal parties, against whom no relief is sought, and who are residents of the same State with the real defendants, are made defendants, when they might properly be joined as plaintiffs, will not defeat the jurisdiction of the federal court, on the ground that the parties on one side are not all citizens of different States from those on the other.—REESE v. ZINN, U. S. C. C., D. (W. Va.), 103 Fed. Rep. 97.

50. FEDERAL COURTS—Jurisdiction—Patent Laws.—Where a contract, the validity of which is involved in a suit for infringement of a patent, is not one between the parties to the suit is collateral thereto, and cannot characterize the suit as on the contract, and not one arising under the patent laws, and therefore not within the special jurisdiction of the circuit courts of the United States.—ATHERTON MACH. CO. v. ATWOOD-MORRISON CO., U. S. C. C. of App., Third Circuit, 102 Fed. Rep. 949.

51. FEDERAL COURTS—Scope of Powers—City Ordinances.—Where no federal question is involved, it is hardly within the province of a federal court to declare void a municipal ordinance, passed under a general grant of power from the legislature, on the ground that its provisions are unreasonable, and therefore in excess of the powers to be inferred from the grant.—SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. CITY OF RICHMOND, U. S. C. C. of App., Fourth Circuit, 103 Fed. Rep. 81.

52. FRAUDS, STATUTE OF—Promise to Pay Debt of Another.—If a debtor apply to his creditor for further credit for goods to be used in connection with his business, which the creditor refuses; and a third person, pecuniarily interested in the success of the debtor's business, agree to assume the debt if the creditor will extend further credit; and the creditor discharge the debtor from the debt, look to the third person for payment thereof, and extend to the original debtor further credit—the promise by the third person to pay the original debt is not collateral, but an original undertaking, and need not be in writing.—FERST v. BANK OF WAYCROSS, Ga., 36 S. E. Rep. 773.

53. FRAUDULENT CONVEYANCES — Evidence.—A conveyance of property by an insolvent mother to her daughter and the husband of the latter is not necessarily fraudulent, and when the jury was authorized, under the evidence, to find that such conveyance was made in good faith and for a proper and legal consideration, the verdict, in the absence of any error of law on the part of the judge, ought not to be set aside.—COOLEY v. ABBEY, Ga., 36 S. E. Rep. 786.

54. FRAUDULENT CONVEYANCES—Life Policy—Insolvency of Insured.—Where insured agreed to take out a policy in his wife's favor in consideration of being allowed the income from her estate during the life of the policy, and such income exceeded the amount of premiums paid by him, the payment of such premiums was not voluntary, and hence insured's creditors could not reach the amount of the policy paid his wife on the ground of his insolvency when such premiums were paid.—FIRST NAT. BANK OF ASBURY PARK v. WHITE, N. J., 46 Atl. Rep. 1092.

55. GAMBLING CONTRACTS—Validity—Bankruptcy.—A bill of sale intended as security for a loan of money to be used in dealing in differences, in the profits of which the vendee is to participate, is invalid as against the trustee in bankruptcy of the vendor.—MARDEN v. PHILLIPS, U. S. D. C., D. (Mass.), 103 Fed. Rep. 196.

56. GARNISHMENT—Tax Execution.—Where a tax execution has been by the tax collector transferred to a private person, such transferee cannot base upon it a garnishment proceeding against a debtor of the defendant in execution.—DAVIS v. MILLEN, Ga., 36 S. E. Rep. 803.

57. GUARANTY — Corporate Stock—Tender.—When one induces another to purchase stock in an incorporated company, and in consideration thereof undertakes in writing to guaranty to pay to the subscriber "one hundred cents in the dollar" for the stock "within ninety days from the date" of such agreement, the purchaser could not maintain against the guarantor an action upon the contract without showing affirmatively that in due time he had tendered the stock to the latter, and demanded of him payment in accordance with the terms of the agreement.—MORRIS v. VEACH, Ga., 36 S. E. Rep. 753.

58. INSURANCE — Construction—Alienation of Property.—Where there is an express provision in a policy of insurance that the policy shall be void if the property shall be sold without the insurer's consent, a provision that the policy shall be void if, without the insurer's consent, "the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks," will not be construed to embrace changes of situation or circumstances made by a sale.—CLINTON v. NORFOLK MUT. FIRE INS. CO., Mass., 57 N. E. Rep. 998.

59. INSURANCE — Premium—Forfeiture.—An insured in a life insurance policy secured several premium loans on the policy from the company, and at length, on negotiation of a further loan, gave a note covering the entire amount borrowed, which note provided that, if the interest due thereon should not be paid when due, the policy might be sold to satisfy the claim of the company; and thereafter the policy was sold on the ground that insured had not paid sufficient interest while, as a matter of fact, the amount paid by insured, together with dividends on the policy to which she was entitled, was sufficient to liquidate the interest due. Held, that equity, at the suit of the beneficiary, would relieve against the forfeiture.—UNION CENT. LIFE INS. CO. v. CALDWELL, Ark., 58 S. W. Rep. 855.

60. JUDGMENT—Joint Judgments—Parties.—All persons against whom a joint judgment has been rendered must be made parties to a proceeding to reverse such judgment, and that a failure to join any of them either as plaintiffs or defendants is ground for dismissal of the case.—GOODWIN v. WYETH HARDWARE & MFG. CO., Kan., 62 Pac. Rep. 11.

61. JUDGMENT — Lien — Homestead. — A judgment against the owner of lands used as a homestead is not a lien on such lands, and hence a purchaser acquires a title thereto free from such judgment.—NORTHRUP v. HORVILLE, Kan., 62 Pac. Rep. 9.

62. JUDICIAL NOTICE—Judges—Term of Court.—The court will take judicial notice that a particular circuit judge was regularly assigned to hold court in a certain circuit within a State at a certain time.—BARNWELL v. MARION, S. Car., 36 S. E. Rep. 818.

63. JUDICIAL SALE—Purchaser's Title.—A purchaser of land at judicial sale, acting in good faith and without notice, acquires title as against a prior conveyance by the owner, unrecorded at the time of the making and confirmation of such sale.—OUSLEY v. BAILEY, Ga., 36 S. E. Rep. 750.

64. LANDLORD'S LIEN—Sale by Tenant—Intent to Defraud.—In order to render penal a sale by a tenant of personalty which is subject to a landlord's lien for rent and advances, it must appear that such sale was made without the consent of the landlord, with intent to defraud him, and that in consequence of such sale he sustained a loss.—MORRISON v. STATE, Ga., 36 S. E. Rep. 902.

65. LIBEL—What Constitutes.—To publish of a merchant that he has given a mortgage upon his stock of goods, though the same does not appear of record, is not actionable, without allegations of special damage.—DUN v. WEINTRAUB, Ga., 36 S. E. Rep. 809.

66. MARRIED WOMAN — Deed—Garnishment.—Where the debtor merely has the legal title to the fund in a garnishee's possession, and where the equitable title is in the claimants, a garnishment proceeding cannot be maintained.—RUSHTON v. DAVIS, Ala., 28 South. Rep. 476.

67. MASTER AND SERVANT—Independent Contractor—Injury to Third Person.—Where an owner of property employs a competent independent contractor to repair chimneys, and retains no authority over the details of the work, or the manner in which it shall be done, such owner, though he retains the right of control of the premises, is not liable to a person on the street for an injury from falling bricks, caused by the contractor's negligence.—BOOMER v. WILBUR, Mass., 57 N. E. Rep. 1004.

68. MASTER AND SERVANT—Injury — Assumption of Risk.—Notwithstanding his own expressed fears that the walls of the trench in which he was working as an employee of the receivers of a railroad company might fall and do him bodily injury, the plaintiff, a man of very limited experience in that kind of work, continued in the employment, relying upon the assurance of the foreman in charge of the work that the same was entirely safe. Held, that all questions as to the defendant's negligence and as to the plaintiff's assumption of the risks of the employment were for determination by the jury.—WALKER v. SCOTT, Kan., 61 Pac. Rep. 1091.

69. MASTER AND SERVANT—Injuries—Proximate Cause.—An employee who has suffered a physical injury cannot maintain therefor an action against his master merely because there may have been on the part of the latter negligent acts or omissions, which, though they may to some extent have contributed to bringing about a dangerous situation, in which the employee did an act from which the injury directly resulted, were not themselves the cause of the injury.—CENTRAL OF GEORGIA; RY. CO. v. EDWARDS, Ga., 36 S. E. Rep. 810.

70. MASTER AND SERVANT—Employee—Negligence—Promise to Remedy.—Where the master conducting an enterprise of hazard promises an employee to remedy a defect in the instrumentalities he furnishes, or to discharge an incompetent servant, the person receiving such promise may wait in reliance thereon a reasonable length of time for the fulfillment of the same, where the danger is not imminent; and the promisee does not thereby assume the risk of injury resulting therefrom.—VOGT v. HONSTAIN, Minn., 83 N. W. Rep. 538.

71. MASTER AND SERVANT—Special Verdict.—Rev. St. § 2858, provides that on request the court shall prepare a special verdict, "in the form of questions, in writing, relating only to material issues of fact and admitting a direct answer." A sawmill employee's complaint in an action for injuries alleged that his employer failed to provide a reasonably safe place for his work, and that he failed to inform plaintiff of the dangers attendant thereon. Held that, on request for a special verdict, the submission of the question whether defendant was guilty of negligence in merely permitting plaintiff to work where he did was improper, since the question raised was not issuable.—SLADKY v. MARINETTE LUMBER CO., Wis., 83 N. W. Rep. 514.

72. MASTER AND SERVANT—Voluntary Services.—An employee who, as a mere volunteer, does an act entirely outside of the scope of his employment, and in consequence receives personal injuries, cannot hold his master liable therefor.—ALLEN v. HIXSON, Ga., 36 S. E. Rep. 810.

73. MECHANICS' LIENS—Payment to Contractor—Rights of Assignee.—Where, under a contract for the erection of a school building, monthly estimates are to be made by the architect of the value of the work done, independently of materials furnished and not then used in the building, and the school trustees are to draw a warrant in favor of the contractor for 75 per cent. of such estimate, the assignee of a warrant issued to the contractor by the trustees upon an estimate made by the architect, for a valuable consideration, is entitled to payment, as against the claims of material-men, of which no notice was served until after the assignment of the warrant.—LONG BEACH SCHOOL DISTRICT v. LUTGE, Cal., 62 Pac. Rep. 86.

74. MINING CLAIM—Notice of Location—Description.—The law will not hold the locator of a mining claim to a strict and technical observance of the statute in respect to the terms of his notice, so long as he substantially complies with its requirements; and if it appears that the location was made in good faith, and by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient.—WELLS v. DAVIS, Utah, 62 Pac. Rep. 8.

75. MORTGAGE—Acknowledgment—Collateral Attack.—Though the fact that a mortgagor's wife acknowledged the instrument before a notary public who was an officer in the grantee corporation rendered the instrument invalid, that question could not be raised in an action for the recovery of the land, based on the deed.—MONROE v. ARTHUR, Ala., 28 South. Rep. 476.

76. MORTGAGES — Foreclosure — Crops Covered by Chattel Mortgage.—A purchaser of lands at foreclosure sale took the growing crops, notwithstanding a chattel mortgage on the same, made before sale, on the mortgagor's share, as rent owing him from a tenant whose term was unexpired, since such rent did not accrue till the harvesting of the crops, which occurred after sale, and hence was payable to the purchaser, rather than the mortgagor.—JONES v. ADAMS, Oreg., 62 Pac. Rep. 16.

77. MORTGAGES—Foreclosure—Setting Aside Sale.—Where, on default in payment of a mortgage, the assignee of the mortgagor bought at the foreclosure sale without unfairness or irregularity in the foreclosure proceedings, the fact that the assignee purchased the mortgage and indebtedness secured thereby at the

mortgagor's request, under an agreement to give the mortgagor management of the mortgaged premises and a support therefrom for a certain time, and then deed a portion thereof to him, thus deceiving and overreaching him, and that the premises were sold for less than their value, is insufficient to authorize equity to set aside the sale, and allow redemption under the mortgage, since mere breach of assignee's contract does not afford ground for equitable relief.—HUNTER v. MELLEN, Ala., 28 South. Rep. 468.

78. MORTGAGES—Foreclosure Sale—Failure of Title.—A purchaser of land at a master's sale under foreclosure is entitled to an abatement in the price bid, on discovery after the sale, and before a deed has passed, that a portion of the lands described in the decree and advertisement of sale had been recovered from the mortgagor by title paramount.—PEOPLE'S BANK OF GREENVILLE v. BRAMLETT, S. Car., 36 S. E. Rep. 912.

79. MUNICIPAL CORPORATIONS — Defective Bridge—Liabilities.—A city is not liable for injuries resulting from the defective condition of a bridge over a road on private property, approached by a gate, and in no way controlled by the city or open to the public. This is true although the bridge is within the corporate limits of the city.—MAYOR, ETC. OF SANDERSVILLE v. HURST, Ga., 36 S. E. Rep. 757.

80. MUNICIPAL CORPORATIONS — Telephone Wires—Ordinance.—The city council or governing body of a municipality has the undoubted right in the exercise of the police power to order the placing of telegraph and telephone wires under ground whenever, in the exercise of a fair discretion, it decides that public interest require it to be done; but it cannot act arbitrarily in the premises.—NORTHWESTERN TEL. EXCH. CO. v. CITY OF MINNEAPOLIS, Minn., 83 N. W. Rep. 527.

81. NATIONAL BANKS—Liability of Stockholders.—The purpose of the provisions of the national banking law relating to liability of stockholders is that, in case of the insolvency of the bank, its shareholders shall be liable for its debts to the extent of the amount of their stock, and the law is to be construed in view of such purpose. The comptroller has power to order successive assessments, in the aggregate within the limit of the stockholders' full liability; and this power cannot be affected, and the purpose of the law defeated, by the fact that a receiver, in enforcing a first assessment, has sued at law rather than in equity, and has recovered a judgment which has been satisfied.—STUDEBAKER v. PERRY, U. S. C. C. of App., Seventh Circuit, 102 Fed. Rep. 947.

82. PLEADING — Banks — Action for Deposits.—A formal demand is a condition precedent to the misdemeanor of an action against a banker for a deposit, which must be alleged in the complaint; and the money counts do not aver a demand nor any excuse for not making it, and are insufficient.—TOBIAS v. MORRIS, Ala., 28 South. Rep. 517.

83. PRINCIPAL AND AGENT—Liability to Principal.—A managing agent of a warehouse company, without disclosing the fact to his principal, made profits in the business use of the name of the company, and outside of the scope of its corporate authority. Held, that such profits belonged to the company.—GOODHUE FARMERS' WAREHOUSE CO. v. DAVIS, Minn., 83 N. W. Rep. 581.

84. PRINCIPAL AND SURETY — Enforcement of Contribution.—Though a surety might in some instances, without payment, compel a co-obligor to pay his portion of a common obligation, the remedy is not available if the person to whom payment should be made is not a party to the action, since he could not be compelled to accept payment.—LADD v. CHAMBER OF COMMERCE, Oreg., 61 Pac. Rep. 1127.

85. PUBLIC LANDS—Mistake in Survey.—The land department of the United States has no power to correct errors in a survey of public lands after such lands have been sold, by reference to such survey, to purchasers in good faith; the remedy of the government, if a mistake has been made to its injury, being by a suit in the courts.—MURPHY v. KIRWAN, U. S. C. C., D. (Minn.), 103 Fed. Rep. 104.

86. RAILROADS — Foreclosure of Liens—Decree.—A holder of railroad bond, who becomes a party by intervention to a suit against the company in which receivers have previously been appointed, and by authority of the court have issued receivers' certificates, is concluded by a subsequent decree which adjudges the validity of such certificates as liens; and unless he takes steps to review such decree, by petition for rehearing or appeal, he cannot contest the question on distribution of the proceeds of the property after sale.—FIRST NAT. BANK OF HOUSTON v. EWING, U. S. C. C. of App., Fifth Circuit, 103 Fed. Rep. 168.

87. RAILROAD COMPANY—Crossing Private Lands.—A railway company which, in granting a right of way to an adjacent owner, stipulates that the way granted is to be always so used and enjoyed as to do no unnecessary damage to the roadbed, and so as not to impede any trains when in motion on its tracks, after such way has been used for a number of years, open and unobstructed, cannot obstruct it by gates, bars, or other fences, since it sufficiently appears that the way granted was a free right of passage.—HAMLIN v. NEW YORK, ETC. R. CO., Mass., 57 N. E. Rep. 1006.

88. RAILROAD COMPANY — Foreclosure of Mortgage—Reorganization Agreement.—A decree foreclosing mortgages on a railroad cannot be impeached because of a prior agreement between a committee of bondholders and officers and directors of the company to form a reorganized company, and purchase the property at the sale, and thereby relieve it from the unsecured debts of the company, even though it is a part of such agreement that stockholders of the old company may obtain stock in the new on payment of a small difference, where the mortgages are due because of default in the payment of interest, and the company is in fact insolvent, and it does not appear that the trustees who brought the suit are parties to or had knowledge of the agreement, or that the default which matured the mortgages was due to such agreement.—FARMERS' LOAN & TRUST CO. v. LOUISVILLE, ETC. RY. CO., U. S. C. C., D. (Ind.), 103 Fed. Rep. 110.

89. RAILROAD COMPANY—Street Railroads — Crossing Other Roads—Additional Servitude.—No new burden or servitude is imposed upon a public street or highway by constructing and operating therein a street railway for the transportation of passengers, the cars of which are propelled by electric power.—SOUTHERN RY. CO. v. ATLANTA RY. & POWER CO., Ga., 36 S. E. Rep. 873.

90. RECEIVERS — Appointment — Exhausting Legal Remedies.—Decree appointing receiver will not be set aside on motion of a creditor because the creditor applying for the appointment had not had an execution issued and returned unsatisfied, no objection on this account having been made by the corporation to the application.—ENOS v. NEW YORK & O. R. CO., U. S. C. C., S. D. (N. Y.), 103 Fed. Rep. 47.

91. REMOVAL OF CAUSES — Foreign Corporations.—A railroad company incorporated under the laws of another State is a non resident of South Carolina, for the purpose of removal of causes to a federal court, though it has complied with the requirements of Act March 19, 1896, providing that thereupon such corporation shall become a domestic corporation, with all the rights and liabilities thereof.—CALVERT v. SOUTHERN RY. CO., S. Car., 36 S. E. Rep. 750.

92. REMOVAL OF CAUSES—Separable Controversy.—An action in tort against two defendants to charge them with liability on the ground of the negligence of servants employed by them jointly, does not involve a separable controversy, so as to be removable by one defendant alone.—MARRS v. FELTON, U. S. C. C., D. (Ky.), 102 Fed. Rep. 775.

93. REMOVAL OF CAUSES—Separable Causes of Action.—An action by the receiver of an insolvent bank

against numerous stockholders for the recovery of an assessment made upon the several stockholders for each one's *pro rata* share of the deficiency of funds necessary to discharge the obligations of the corporation involves a separable controversy within the provisions of the removal act.—CALDERHEAD v. DOWNING, U. S. C. C., D. (Wash.), 102 Fed. Rep. 27.

94. RES ADJUDICATA—Appeal.—Under Const. art 5, § 12, providing that judgments shall be affirmed in the supreme court when the justices are divided equally in their opinions, a judgment affirmed under such conditions is *res judicata* of the issue involved as to the particular case.—JOHNSON v. CHARLESTON & S. RY. CO., S. Car., 36 S. E. Rep. 851.

95. SCHOOLS — Building Contract — Bond — School Buildings.—Code Civ. Proc. § 1183, provides that contracts made between reputed owners of property and contractors for the construction of buildings shall be filed with the county recorder. Section 1203 declares that every contract required to be filed shall be accompanied by a bond guarantying payment of labor and material. Held, that a school district in contracting for the erection of a school house, though not expressly authorized to require a bond under the sections recited, could nevertheless do so, as it was not prohibited.—UNION SHEET-METAL WORKS v. DODGE, Cal., 62 Pac. Rep. 41.

96. TAXATION—Interstate Commerce—License.—The "Interstate Commerce Clause" of the constitution of the United States does not operate to prevent a State from imposing, for the purpose of raising revenue, a license tax upon persons who, as traveling agents for principals residing in other States, make executory contracts for the sale of goods, and who, when the same are shipped into this State, receive them in bulk, break the original packages in which they are contained, and distribute them among the customers with whom such contracts had been made.—RACINE IRON CO. v. MCCOMMONS, Ga., 36 S. E. Rep. 866.

97. TRADE-MARKS — Infringement — Damages.—The amount recoverable by the owner of a trade-mark from a willful infringer is not limited to the profits made by the defendant, but includes also the damages resulting to the complainant from the injury to his business or the reputation of his goods.—HENNESSY v. WILMERDING-LOEWE CO., U. S. C. C., N. D. (Cal.), 103 Fed. Rep. 90.

98. TRADE MARKS—Name Descriptive of Quality.—Defendant, who had selected for its customers, from manufacturers' stocks, shoes so constructed as to bring the weight of the body on the inside of the center line, and applied the name "Delsarte" thereto, for several years prior to its use by complainant to designate a line of shoes manufactured and sold by it, was not entitled to use such name as a trade-mark for any kind of shoes it might make or sell, since its prior use of the word was to indicate the particular quality or character of the shoes selected by it, and not as a fancy name.—MEDLAR & HOLMES SHOE CO. v. DELSARTE MFG. CO., N. J., 46 Atl. Rep. 1089.

99. TROVER — Forthcoming Bond—Estoppel.—There was no error in refusing to grant the nonsuit. The execution of a recognizance, payable to the plaintiff, for the forthcoming of personal property, where bail has been required, in an action of trover, does not estop the defendant from denying that he ever was in possession of the property to recover which the suit was instituted.—BELL v. G. OBER & SONS CO., Ga., 36 S. E. Rep. 904.

100. TRUSTS—Executors—Powers under Will.—Under a will giving the executor power, should it be necessary, to raise in such way as it seems best to him a sufficient amount of money to pay the debts of the testator, the executor is authorized to borrow money for the purpose of paying such debts, and to secure the loan by mortgage or security deed. Where money is borrowed under such power, it is not incumbent on the lender to ascertain whether there are debts of the testator or not; the loan being made within a reasonable time after the death of the testator and the probate of the will.—FLETCHER v. AMERICAN TRUST & BANKING CO., Ga., 36 S. E. Rep. 767.

101. VENDOR AND PURCHASER—Loss by Fire.—Where a binding executory contract for the sale of improved realty has been made, and the improvements are destroyed by fire before the vendor is in a position to convey the legal title, and before the vendee obtains possession, the loss is that of the vendor.—PHINIZY v. GUERNSEY, Ga., 36 S. E. Rep. 796.

102. WATERS—Negligence.—Though the plaintiff, by her method of irrigation, caused surface water to accumulate on her low land, she could nevertheless recover against an irrigation company for discharging quantities of water thereon and increasing her injury.—EMISON v. OWYHEE DITCH CO., Oreg., 62 Pac. Rep. 18.

103. WATER COURSES—Rights of Millowners—Pollution of Water.—Where there are two ore mills in operation on the same stream, the lower proprietor may be compelled to take some steps and be at more expense than he would if he were the only proprietor on the stream; and it is the duty of the upper proprietor to use great care and caution, and to take such action as will avoid, as far as possible, any injury occurring to the lower proprietor by the flow of tailings from his mill.—OTAHEITE GOLD & SILVER MIN. & MILL CO. v. DEAN, U. S. C. C., D. (Nev.), 102 Fed. Rep. 929.

104. WATER RIGHTS — Appurtenant to Land.—One party's right to use water for irrigation purposes is not necessarily incompatible with another's right to use the same water in operating a gold mine, since the growth of plants is stimulated by the application of water in the spring and summer, and the separation of gold is usually accomplished in the rainy or winter season.—MATTIS v. HOSMER, Oreg., 62 Pac. Rep. 17.

105. WILL—Contest.—When the attestation clause to such an instrument recites all the facts essential to its due execution as a will, and it is shown that the alleged testator and those whose names appear thereon as witnesses actually affixed their signatures to the paper, a presumption arises that it was executed in the manner prescribed by law for the execution of wills; and this is so though there may be on the part of one or more of the witnesses a total failure of memory as to some or all of the circumstances attending the execution.—UNDERWOOD v. THURMAN, Ga., 36 S. E. Rep. 788.

106. WILL—Trusts—Life Estate.—Where testator, after directing his wife, as his executrix, to pay all his debts and funeral expenses out of his personal estate, devised the residue of his estate to her for life, to support herself and to support and educate testator's children, the life estate given the wife was incumbered with a trust for the support and education of testator's children, and she had no power to sell her life interest in the estate.—HUNTER v. HUNTER, S. Car., 36 S. E. Rep. 734.

107. WILLS—Trusts—Life Estates—Perpetuities.—That a devise of land gave the devisee full control, with full power to deed to her grantees, their heirs and assigns, forever, did not create a fee, where all other parts of the will indicated a life estate, with power in the devisee to sell so much as would insure her a comfortable living, since the provision as to power to sell should be construed as inserted merely to make clear devisee's right to sell in case of necessity.—MORSE v. INHABITANTS OF NATICK, Mass., 57 N. E. Rep. 996.

108. WILLS—Validity—What Law Governs.—Where a testator, having real and personal estate in Pennsylvania, and his domicile in that State, and having also real estate in Virginia and West Virginia, after certain specific bequests devises all the residue of his estate to a city in Virginia, the validity of such residuary devise, as respects the real and personal property of the testator in the State of Pennsylvania, is to be determined by the law of that State.—HANDLEY v. PALMER, U. S. C. C. of App., Third Circuit, 103 Fed. Rep. 40.